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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No.

MICHAEL F. MURRAY,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

I.

When officers discover evidence during an illegal search, later obtain a valid warrant, "search" the premises again and seize what they previously found, must such evidence be suppressed, as six other Circuits and the highest courts of eight states have decided, or is there an exception to the exclusionary rule in such circumstances, as the First Circuit held in this case?

II.

Whether only such delay as is reasonably necessary for fair processing of pre-trial motions is excludable under 18 U.S.C. § 3161(h)(1)(F), and whether this case should be consolidated for review of that question with *Henderson v. United States,* No. 84-1744, certiorari granted, 54 U.S.L.W. 3242 (Oct. 15, 1985)?[1]

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[1]With respect to this question, petitioner relies upon the Petition for a Writ of Certiorari filed on or before December 30, 1985, by James D. Carter and Christopher Moscatiello, who were his co-defendants and co-appellants in the courts below. See Petition for a Writ of Certiorari in *Carter & Moscatiello v. United States,* Oct. Term 1985, No. 85-1105.

In addition to Carter and Moscatiello, John M. Rooney was also an appellant in the court of appeals.

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OPINIONS BELOW

The opinion of the court of appeals (App. 1a, *infra,*) is reported at 771 F.2d 589. The opinion of the district court (App. 32a, *infra*) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1985 (App. 49a, *infra*). On October 31, 1985, the court denied a timely petition for rehearing (App. 50a, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourth Amendment to the Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 3161 (h)(1)(F) of the Speedy Trial Act provides in pertinent part:

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

> (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—
>
> (F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion; . . .

STATEMENT

Petitioner Michael F. Murray was named in a five-count indictment charging possession of more than one thousand pounds of marijuana with intent to distribute, and conspiracy, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(6), and 846. After a five-day jury

trial, Murray was acquitted on two counts, convicted on one count of conspiracy[1] and sentenced to four years' imprisonment and a $15,000 fine.[2]

Prior to trial, Murray moved to suppress evidence found in a warehouse in South Boston, Massachusetts. The suppression hearing revealed that not one, but two searches of the warehouse had occurred on April 6, 1985, the first without a warrant and the second eight hours later pursuant to a warrant.

A. THE SEARCHES OF THE WAREHOUSE

By early afternoon on Wednesday, April 6, 1983, fifteen agents of the DEA and FBI had become involved in monitoring every movement of the original defendants in this case (Pretrial Tr. 5-4). About 2:00 p.m., agents in South Boston saw a white truck and a green camper pull into a warehouse, which FBI

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[1]The trial court had dismissed two counts against Murray at the close of the government's case.

[2]Co-defendant James Carter was also charged in all five counts of the original indictment; Murray's brother Joseph Murray was added as a defendant in all counts by a superseding indictment. Two of the conspiracy and possession counts also named Arthur Barrett, and John Rooney; two other conspiracy and possession counts also named Stephen King and Christopher Moscatiello.

Rooney and Moscatiello entered conditional guilty pleas (see Rule 11(a)(2), Fed. R. Crim. Pro.). Barrett became a fugitive before trial. The court granted Joseph Murray's motion for judgment of acquittal. After the government rested, the court dismissed one of the counts against King and the jury returned a verdict of not guilty on the remaining count against him.

After the close of the government's evidence, the court dismissed two counts against Carter. The jury convicted Carter of one conspiracy count and acquitted him of the remaining two counts.

agents had been keeping under constant surveillance since 1:00 p.m. (Pretrial Tr. Keaney 25, 30; 3-11 -3-12, 6-28, 7-66). When the white truck and green camper left the warehouse a few minutes later, DEA agents followed both vehicles, watched a driver exchange occur as the vehicles were parked and then followed the green camper as it headed toward the Southeast Expressway and onto the Massachusetts Turnpike (Pretrial Tr. 6-7 -6-14). Other agents followed the white truck as it headed into Dorchester, Massachusetts (Pretrial Tr. 5-23).

Still other agents, including the DEA agent-in-charge (Pretrial Tr. 5-3), mistakenly believed that no surveillance was being conducted of the green camper after it left the warehouse (Pretrial Tr. 5-22 -5-23). As these agents pulled into a parking lot, they saw a green camper; the DEA agent-in-charge drew his revolver, arrested the occupant and looked into the camper only to find that it contained no contraband and that he had stopped the wrong vehicle and arrested the wrong person (Pretrial Tr. 5-24 -5-25). At the same time, a blue van pulled into the lot and the agents placed its occupants—petitioner Michael Murray and James Carter—under arrest (Pretrial Tr. 3-26, 5-29 -5-30). The agents looked through the interior of the blue van and found nothing (Pretrial Tr. 5-32). An Assistant United States Attorney was with the agents at the parking lot (Pretrial Tr. 3-30, 6-8, 6-9, 6-12). After the arrests, the DEA supervisor and other agents, departed for the warehouse in South Boston (Pretrial Tr. 5-35). They were followed later by the DEA agent-in-charge, who drove Carter and Murray to this address (Pretrial Tr. 5-35).

FBI and DEA agents converged on the South Boston warehouse, which was a white, detached cinderblock building having two large overhead doors facing the street and an entry door on the side of the building (Pretrial Tr. 3-35).[3] Without consulting the DEA agent-in-charge (Pretrial Tr. 5-36) and to the surprise of FBI agents at the scene (Pretrial Tr. 3-31), the DEA supervisor took a tire iron from his car, pried open the side door of the warehouse and entered (Pretrial Tr. Kennedy 31, 3-44). Other DEA agents followed (Pretrial Tr. 7-61).

Inside they noticed a large bay containing several vehicles (Pretrial Tr. 6-15). As the agents combed the warehouse, looking under trucks, inside vehicles and going through an office within the building, they discovered numerous bales of marijuana, red and blue notebooks, and a tape dispenser and pens used to mark the bales, all of which were in plain view and all of which were later introduced at trial (Pretrial Tr. 3-45, 6-15; Tr. 3-205, 4-25, 4-26, 4-46, 4-48).

At least ten agents went inside the warehouse after the DEA supervisor broke open the door (Pretrial Tr. 3-44). When they left the warehouse about 3 p.m., several agents were stationed outside to maintain surveillance (Pretrial Tr. 6-17). The DEA agent-in-charge took Murray and Carter to DEA headquarters (Pretrial Tr. 5-36) and, with two other agents, then

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[3]Petitioner Murray, his brother Joseph and James Carter jointly owned the warehouse. They kept personal items there, and were the only persons who had keys to the door. Petitioner worked in the warehouse daily for months after its purchase and, thereafter, for two or three days per week until April 6, 1983 (Pretrial Tr. 8-90 –8-102).

went to the office of the United States Attorney (Pretrial Tr. Kennedy 34, 5-36).

During the next seven hours, the agents prepared a ten-page affidavit in support of a search warrant for the warehouse; the DEA agent-in-charge signed the affidavit and the magistrate issued the warrant about 10:30 p.m. (Pretrial Tr. 9-29 -9-30; C.A. 46).[4] The magistrate, however, had no way of knowing that the agents had already forcibly entered the warehouse more than seven hours earlier. The affidavit nowhere mentioned the earlier search or what the agents had found (C.A. 34-43)[5]

The agents executed the search warrant at 11:00 p.m. on the evening of April 6, 1983, seizing, among other items, the evidence they had discovered in plain view during their warrantless entry.

B. THE OPINION OF THE DISTRICT COURT

The district court, in rejecting the petitioner's motion to suppress, thought either that the warrantless entry was not a search or that this earlier search of the warehouse could be ignored because the warrant was valid. The district court held that the search warrant was not the "fruit of an illegal search" and therefore was not "vitiated by the prior warrantless entry of the warehouse" (App. 44a). In "Supplemen-

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[4]"C.A." refers to the Consolidated Appendix in the court of appeals.

[5]This decision—to avoid disclosing that the agents had already broken into the building—was admittedly intentional and deliberate and the subject of discussions among the agents during the time they were at the United States Attorney's Office (Pretrial Tr. 5-39).

tary Findings and Ruling on Standing," entered to "complete the record," the district court also held that no defendant had standing to challenge the searches of the warehouse (App. 47a).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals held that both Michael F. Murray and co-appellant James Carter had standing to contest the searches of the warehouse (App. 22a). Indicating that there were no exigent circumstances to justify the warrantless search of the warehouse, the court passed this issue and assumed that the search violated the Fourth Amendment (App. 24a). The court then turned to the "harder question"–whether the district court should have suppressed all evidence first discovered during this illegal search (App. 27a).

Petitioner had argued that whenever an illegal warrantless search takes place, all evidence found during that search must be suppressed regardless whether there is a later search of the same premises pursuant to a valid warrant. The court of appeals recognized "that lower courts presented with the present issue have decided that evidence observed in an illegal search that was also observed and seized in a later search must be suppressed" and that "[a]rguably" the Supreme Court had agreed in *Segura v. United States,* 104 S.Ct. 3380, 3386 (1984) (App. 28a). Nevertheless, citing *Nix v. Williams,* 104 S.Ct. 2501 (1984), the court ruled that because "the discovery of the contraband in plain view [during the illegal search] was totally irrelevant to the later securing of a warrant

and the successful search that ensued," the evidence should not be suppressed (App. 28a).[5a]

REASONS FOR GRANTING THE WRIT

I.

This case involves an all too common pattern of law enforcement activity: first an illegal search and then, after incriminating evidence has been found, a visit to the magistrate and another search, this time pursuant to a warrant. In refusing to suppress what the agents initially discovered in their unlawful search, the First Circuit acknowledged that other "lower courts" had reached the opposite conclusion and this Court "[a]rguably" had as well (App. 28a). But the extent of contrary judicial authority is far greater than even the opinion reveals. The First Circuit's decision conflicts with decisions of the Second, Fourth, Fifth, Sixth, Eighth and Eleventh Circuits. It is flatly inconsistent with opinions rendered by the highest courts of at least eight states. And it is squarely at odds—not "[a]rguably" (App. 28a)—with this Court's opinion in *Segura v. United States*, *supra*.

Several years ago the Solicitor General urged the Court to review a case raising the same issue presented here, which had then been decided against the

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[5a]With respect to the speedy trial issue raised by all appellants (see note 1 *supra*), the court held in its opinion, as amended (App. 54a, *infra*), that after the excludable 30-day period expired with respect to the suppression motions, other motions were also pending and that at least part of this post-30-day period was excludable under 18 U.S.C. § 3161(h)(1)(F) on the basis that it was "reasonably attributable to the remaining nonsuppression motions" (App. 54a).

government.[6] The issue was doubtless important then, but it has assumed far greater significance now that the First Circuit has adopted the government's position and disagreed with so many other appellate courts. Time and again those courts have determined that the result reached here would be intolerable, that it would pose a severe threat to Fourth Amendment rights, and that, rather than encouraging officers to obtain a warrant before conducting a search, it would have the opposite effect.

In this case, the court of appeals stressed that the agents' illegal discovery of evidence in the warehouse did not taint the warrant they procured hours later.[7] But the fact that the agents had independently acquired probable cause to obtain a warrant before they broke into the building and conducted a search without one relates to a different matter. Under *Segura v. United States, supra,* this removes the taint of illegality from evidence discovered for the first time during the warrant-authorized search. The independent basis for the warrant, however, has no bearing on whether the other "primary evidence," already come upon during the initial unlawful search, must be suppressed.[8]

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[6]See the government's Petition for a Writ of Certiorari in *United States v. Griffin,* October Term 1974, No. 74-457, at pp. 2, 8.

[7]The court found, and petitioner does not dispute, that the affidavit supporting the warrant did not mention any of the evidence discovered during the illegal search of the warehouse (App. 21a).

[8]In its brief in *Segura,* the government agreed that "primary evidence"—evidence "discovered while the Fourth Amendment violation is occurring"—"ordinarily should be excluded," while

The court below also suggested that the inevitable discovery rule, see *Nix v. Williams, supra,* could be applied to such illegally discovered evidence, apparently on the basis that since agents had probable cause it was inevitable that eventually they would comply with the Fourth Amendment.[9] The Sixth Circuit has firmly rejected the First Circuit's rationale. In *United States v. Griffin,* 502 F.2d 959 (6th Cir.), *cert. denied,* 419 U.S. 1050 (1974), which has been widely followed, agents illegally entered premises without a warrant, discovered narcotics and related paraphernalia in plain view, and four hours later obtained a warrant and seized the same items. As here, "the affidavit upon which the search warrant was procured did not contain any facts discovered as a result of the illegal entry." 502 F.2d at 960. The court of appeals nevertheless suppressed the evidence. As to the government's inevitable discovery argument, the court stated that "police who believe they have probable cause cannot enter a home without a warrant merely because they plan subsequently to get one. . . . Any other view would tend in actual practice

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"derivative evidence" later "discovered through exploitation of a prior constitutional violation" is only excludable as fruit of the poisonous tree if the "connection between the illegality and the evidence is [not] sufficiently attenuated." Brief for the United States in *Segura v. United States,* Oct. Term 1983, No. 82-5298, at p. 13.

[9]This is a prediction that will, in the future, fulfill itself if the decision below is allowed to stand. Officers within the First Circuit's jurisdiction will be able to insulate their illegality by procuring a warrant to search the same premises again and seize what they have already discovered by unlawful means. See p. 14 *infra,* noting that the "search-illegally-first-obtain-a-warrant-later" procedure had become standard police practice elsewhere.

to emasculate the search warrant requirement of the Fourth Amendment." 502 F.2d at 961.

The Eleventh Circuit, in a decision rendered after *Nix v. Williams, supra,* agrees with the Sixth Circuit. In *United States v. Satterfield,* 743 F.2d 827 (11th Cir. 1984), the government contended that evidence first discovered illegally should not be excluded because it "inevitably" would have been found pursuant to the valid search warrant that issued several hours later. 743 F.2d at 845. The court held that the inevitable discovery rule of *Nix* did not apply. The rule can be invoked only if officers "possessed and were pursuing a lawful means of discovery at the time the illegality occurred." The lawful means in regard to a search is a warrant, which in *Satterfield* (as here) was neither sought nor obtained until after the illegal search. The Fourth Amendment requires that "a warrant . . . be obtained *before* the search takes place" and allowing illegally discovered evidence to be admitted on the grounds urged by the government would "practically destroy" that requirement. 743 F.2d at 846 (emphasis in original).

The decision below places the First Circuit in direct conflict not only with the Sixth and Eleventh Circuits, but also with the Second Circuit (*United States v. Segura,* 663 F.2d 411, 417 (2d Cir. 1983), *aff'd,* 104 S.Ct. 3380 (1984)); with the Fifth Circuit (*United States v. Congote,* 656 F.2d 971, 974, 976 (5th Cir. 1981), following *Griffin*; with the Eighth Circuit (*United States v. Williams,* 737 F.2d 735 (8th Cir. 1984);[10] and, by implication, with the Fourth Circuit

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[10]After an illegal entry in violation of the Fourth Amendment "one successfully could challenge the admission of only that evi-

(*United States v. Dart*, 747 F.2d 263, 270-71 (4th Cir. 1984).[11]

In the state courts, there is also a long line of cases flatly inconsistent with the decision below. The quotations in the margin show that the highest courts of Alaska,[12] California,[13] Colorado,[14]

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dence discovered as a result of the initial entry; evidence that was not discovered until after the valid search warrant was brought to the house need not be suppressed." 737 F.2d at 740.

[11]In *Dart*, the court first identified which evidence had been discovered during the unlawful search and upheld its suppression; the court only then turned to the question whether other evidence found during a later search of the premises pursuant to a warrant should be excluded. 747 F.2d at 270–71.

[12]*Unger v. State*, 640 P.2d 151, 159 n. 9 (Alaska 1982) (dictum) ("broad application of the inevitable discovery doctrine to warrantless searches and seizures or warrantless arrests would effectively obliterate the warrant requirement of the fourth amendment").

[13]*People v. Cook*, 148 Cal. Rptr. 605, 583 P.2d 130, 148 (1978) (*en banc*) (to admit evidence first discovered illegally and later seized pursuant to a warrant allows an officer to "conduct an unlawful confirmatory search, thus saving himself the time and trouble of obtaining and executing a warrant if he does not find the evidence. He can safely engage in this conduct because [under such a ruling] if the evidence does turn up in the course of illegal search, he will still be allowed to seize it later in a second 'search' under color of a warrant. The latter prospect thus gives him strong incentive to proceed with the warrantless entry.")

[14]*People v. Barndt*, 199 Colo. 51, 604 P.2d 1173, 1179 (1980) (*en banc*), holding that there should be "[s]uppression of the evidence found in plain view during the illegal search" and admitting (as in *Segura*) other evidence discovered during a later search pursuant to a warrant.

See also *People v. Schoondermark*, No. 83CA0851, (Colo. App.,

Iowa,[15] Massachusetts,[16] New Jersey,[17]

Oct. 24, 1985), slip op. at 4–5:

> We conclude that the inevitable discovery rule is inapplicable to rehabilitate evidence which has been seized during a search conducted in violation of a defendant's Fourth Amendment rights. To hold otherwise would justify, if not encourage, warrantless searches. To allow admission of evidence seized in an illegal search on the theory that proper execution of a search warrant would have disclosed the seized evidence would emasculate the search warrant requirement of the Fourth Amendment and would eviscerate the exclusionary rule. It would authorize the police to circumvent the magistrate which the United States Constitution interposes, as a safeguard, between the exercise of governmental power and the rights of the citizenry. *See McDonald v. United States,* 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948). Unconstitutional government intrusions would, as a practical matter, be beyond judicial review. *United States v. Griffin, supra.*

[15]*State v. Williams,* 285 N.W.2d 248, 259 (Iowa 1979), *cert. denied,* 446 U.S. 921 (1980) (dictum) (to apply the inevitable discovery rule "would result in deletion of the warrant clause from the fourth amendment because that clause's sole purpose is to insert a magistrate between the proposed subject of a search and police officers who assert probable cause for the search.").

[16]*Commonwealth v. Benoit,* 382 Mass. 210, 415 N.E.2d 818, 823 (1981) (to apply the " 'inevitable discovery' rule to cure an illegal warrantless search on the basis that it was inevitable that a warrant would be obtained" "would be to read out of the Constitution the requirement that the police follow certain protective procedures—in this case, the warrant requirement of the Fourth Amendment.")

[17]*State v. Sugar,* 100 N.J. 214, 495 A.2d 90, 104 n.3 (1985) (dictum) ("when the illegality that gives rise to the claim of 'inevitable discovery' consists simply of the failure to obtain a search warrant, the exception should not be applied to circum-

New York,[18] and Oregon,[19] as well as the intermediate appellate courts of Florida[20] and Maryland[21] have ren-

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vent the warrant requirement," citing *Commonwealth v. Benoit, supra; United States v. Griffin, supra;* and this Court's decision in *Nix v. Williams, supra.)*

[18]*People v. Knapp,* 52 N.Y.2d 689, 422 N.E.2d 531, 536 (1981) ("Were the rule otherwise, every warrantless nonexigent seizure automatically would be legitimatized by assuming the hypothetical alternative that a warrant had been obtained. Without the deterrent effect of the exclusionary rule, in such circumstances the constitutional warrant procedure for shielding Americans from unreasonable searches and seizures would be a shambles."). Accord *People v. Arnau,* 58 N.Y.2d 27, 444 N.E.2d 13, 18 (1982).

[19]*State v. Hansen,* 295 Or. 78, 664 P.2d 1095, 1104 (1983) (*en banc*), suppressing "such items of evidence as are actually discovered by the entering officers" illegally, citing *United States v. Griffin, supra.*

[20]*State v. Ramos,* 405 So.2d 1001, 1002-03 (Fla. Dist. Ct. App. 1981):

> . . .The police cannot be permitted to search and seize persons and homes in the absence of a warrant or exigent circumstances while they seek some independent evidentiary basis to justify a search warrant. Such after-the-fact justifications are anathema to the Fourth Amendment warrant and reasonableness requirements. *United States v. Griffin, supra.* Any other ruling would, as a practical matter, permit the police to disregard the warrant requirement altogether, by illegally seizing and searching vehicles or houses, and seeking warrants only when such illegal activities produce indications or clues that contraband will be found by a more detailed search.

[21]*Spiering v. State,* 58 Md. App. 1, 472 A.2d 83, 89 (Ct. Sp. App. 1984) ("To sanction belated warrants based upon evidence independent of the initial seizure, however, would permit the police to view the warrant requirement as an *ex post facto* formality.").

dered decisions contrary to the opinion in this case.[22] The ruling of the California Supreme Court is particularly noteworthy because, after an earlier decision appeared to adopt the same position as that of the court of appeals in this case, state officers began following what the California Supreme Court described as a "search-unlawfully-first-obtain-the-warrant-later procedure." *People v. Cook, supra,* 148 Cal. Rptr. at ___, 583 P.2d at 146-48.[23] The California Supreme Court, sitting *en banc,* found it necessary to call a halt to this practice by overruling its prior decision and holding that evidence discovered during an unlawful search and later seized pursuant to a valid warrant would be excluded. *Id.*

As indicated above, the First Circuit's decision here is also flatly inconsistent with the Second Circuit's holding in *Segura,* a case the court below described as "on all fours" with this one (App. 26a). The Second Circuit in *Segura* held that evidence first discovered during an illegal search must be excluded while other evidence later discovered during an authorized search

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[22]The Supreme Court of New Hampshire has applied the inevitable discovery rule to permit the admission of evidence discovered during an illegal search on the following basis: "although the search warrant was issued after the illegal warrantless search, the police had sought the warrant *prior to and without any reference to the illegality. . . .*" *State v. Holler,* 459 A.2d 1143, 1147 (N.H. 1983). Compare *United States v. Satterfield, supra.* The New Hampshire court cautioned that it would not allow the police to use its decision in *State v. Holler* "to justify illegal searches." 459 A.2d at 1147.

[23]There are indications that this had also become "standard" procedure elsewhere (see Colorado Supreme Court Justice Erickson's concurring opinion in *People v. Barndt, supra,* 604 P.2d at 1179).

need not be suppressed. 663 F.2d 411 (2d Cir. 1981).[24] In upholding "the suppression of such evidence as was discovered upon the unlawful entry," the Second Circuit enforced the protection of the Fourth Amendment in light of "the potential for abuse" created by the sort of ruling handed down by the court of appeals in this case. 663 F.2d at 417.

When *Segura* reached this Court, the Second Circuit's determination that the initial warrantless search violated the Fourth Amendment was not at issue.[25] This Court therefore carefully distinguished between "primary evidence," that is, the evidence discovered during the unlawful search, and "derivative evidence" found only later. See note 8 *supra*. The question before the Court was thus whether the other "evidence subsequently obtained" through a search pursuant to

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[24]In *Segura*, federal agents entered the defendant's apartment without a warrant, conducted a search, discovered a scale and other narcotics paraphernalia, and arrested a co-defendant who was in the apartment with three other people. 104 S. Ct. at 3384. Hours later, the agents obtained a warrant and, after conducting a more thorough search of the apartment, discovered additional evidence—three pounds of cocaine, a quantity of ammunition and records of narcotics transactions. 104 S. Ct. at 3384.

[25]See 104 S. Ct. at 3382, stating that the "Court of Appeals affirmed the District Court's holding that there were no exigent circumstances to justify the warrantless entry into petitioners' apartment. That issue is not before us, and we have no reason to question the courts' holding that that *search* was illegal" (emphasis in original). See also 104 S. Ct. at 3385 n. 4, pointing out that the district court and the court of appeals held that "items discovered in plain view" during the illegal search "had to be suppressed to effect the purposes of the Fourth Amendment" and that the government had not contested this holding in the Supreme Court.

a valid warrant should also be excluded as the " 'fruit' of a prior illegality." 104 S. Ct. at 3386; see also 104 S. Ct. at 3391. On that score, the Court ruled that evidence that remained undiscovered until the authorized search should not be excluded if the warrant is obtained without relying on what was found during the illegal search. In such circumstances the information possessed by the agents before their illegal search and on the basis of which they obtained a warrant, constituted an "independent source" for the discovery and seizure of the challenged evidence, which removed it from the "fruit of the poisonous tree" category. 104 S.Ct. at 3391.

In so holding, the Court majority emphasized that "[e]*vidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion,*" while evidence later discovered pursuant to a warrant must be subjected to the "fruit of the poisonous tree" analysis. 104 S. Ct. at 3386 (emphasis added). The Chief Justice, writing separately for himself and Justice O'Connor, made the same point by noting that the Court's ruling would not detract from the deterrent effects of the exclusionary rule because "*officers who enter illegally will recognize that whatever evidence they discover as a direct result of the entry may be suppressed, as it was by the Court of Appeals in this case.*" 104 S.Ct. at 3390 (emphasis added). There is simply no way to reconcile the decision in this case with *Segura's* reaffirmation of what has been the governing rule since *Weeks v. United States,* 232 U.S. 383 (1914). By refusing to suppress evidence that was the "direct result of an unconstitutional search"—that is, the evidence discovered during the illegal warehouse search—the court below

flatly contradicted this Court's admonition in *Segura*, the Chief Justice's separate statement, and seventy years of Fourth Amendment jurisprudence.

Although the court of appeals invoked *Nix* to support its decision, it failed to confront the implications of its rationale under the Fourth Amendment. The fact that officers already have probable cause when they conduct an unlawful search does not render discovery of the evidence inevitable and does not justify a court's refusal to suppress it. To hold otherwise is to encourage warrantless and illegal searches. If officers find nothing on the premises during their illegal search, they have saved themselves the trouble—at the expense of the Fourth Amendment—of seeking a warrant. On the other hand, if their illegal search uncovers evidence, as it did in this case, they may then insure admissibility by going through the charade of obtaining a warrant and "searching" again for what they have already illegally discovered. Such a system makes a mockery of the Fourth Amendment's warrant requirement, which is why so many appellate courts are lined up against the First Circuit.

There is still another fundamental reason why the decision here cannot rest upon *Nix*. The evidence discovered during the warrantless search of the warehouse was not "derivative evidence"; it was primary evidence found as a direct result of the illegality. See note 8 *supra*. Yet *Nix* dealt only with derivative evidence, stemming from a Sixth Amendment violation, which inevitably would have been discovered by lawful means.[26] This is why the Chief Justice in *Segura* could

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[26]This Court had ruled that the direct product of the Sixth Amendment violation in *Nix v. Williams*—incriminating state-

reaffirm for the Court—without mentioning his earlier opinion in *Nix*—that evidence discovered as a "direct result" of a unconstitutional search in violation of the Fourth Amendment must be suppressed.

II.

As indicated in the Questions Presented section, at note 1, petitioner hereby relies upon the petition for a writ of certiorari filed by co-appellants James D. Carter and Christopher Moscatiello raising an issue common to all appellants in the court below under Section 3161 of the Speedy Trial Act.[27] The Court has already granted certiorari in *Henderson v. United States*, No. 84-1744, 54 U.S.L.W. 3242 (Oct. 15, 1985), to determine whether only such delay as is reasonably necessary for fair processing of pretrial motions is excludable under 18 U.S.C. § 3161(h)(1)(F). This case raises the same issue and also warrants review.

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ments of the defendant—must be suppressed. *Brewer v. Williams*, 430 U.S. 387 (1977).

[27]James D. Carter, the only other defendant who had standing regarding the warehouse, relies upon this certiorari petition filed by Michael F. Murray.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectively submitted,

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APPENDIX

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

CHRISTOPHER MOSCATIELLO,

Defendant, *Appellant.*

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN M. ROONEY,

Defendant, *Appellant,*

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES D. CARTER,

Defendant, *Appellant.*

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL F. MURRAY,

Defendant, *Appellant,*

Nos. 84-1192, 84-1193, 84-1262 and 84-1263.
Argued Oct. 5, 1984.
Decided Aug. 26, 1985

Defendants were convicted in the United States District Court for the District of Massachusetts, Walter Jay Skinner, J., on charges arising out of a conspiracy to possess and distribute illegal drugs, and they appealed. The Court of Appeals, Levin H. Campbell, Chief Judge, held that: (1) warrantless search of camper and truck was valid, and (2) even assuming warrantless entry into warehouse, violated Fourth Amendment, evidence uncovered as result of subsequent search of warehouse pursuant to valid warrant was not subject to suppression since the evidence was discovered through an untainted source and would have been discovered even if the illegality had not occurred; furthermore, valid entry provided independent justification for seizure of marijuana bales which were in plain view at time of the illegal entry and remained in plain view at time of the search pursuant to the warrant.

Affirmed.

Daniel J. O'Connell, Boston, Mass., with whom Eileen D. Vodoklys, Framingham, Mass., was on brief for defendant, appellant Christopher Moscatiello.

Martin G. Weinberg, Boston, Mass., with whom Kimberly Homan and Oteri, Weinberg & Lawson, Boston, Mass., were on brief for defendant, appellant John M. Rooney.

Marshall D. Stein, Boston, Mass., with whom Cherwin & Glickman, Brian J. McMenimen and Gargiulo & McMenimen, Boston, Mass., were on brief for defendant, appellant James D. Carter.

A. Raymond Randolph, Washington, D.C., with whom Christopher L. Varner, Washington, D.C., was on brief for defendant, appellant Michael F. Murray.

Gary C. Crossen, Asst. U.S. Atty., Boston, Mass., with whom William F. Weld, U.S. Atty., Boston, Mass., was on brief for appellee.

Before CAMPBELL, Chief Judge, BREYER, Circuit Judge, and WEIGEL,* Senior District Judge.

LEVIN H. CAMPBELL, Chief Judge.

Defendants appeal from criminal convictions on drug charges.

During the first part of 1983, federal agents received information implicating defendants-appellants John M. Rooney, Christopher Moscatiello, James D. Carter, and Michael F. Murray, as well as Arthur Barrett and Stephen King, in a conspiracy to possess and distribute illegal drugs. That information was corroborated by information received from law enforcement officials in the Boston area and by spot surveillance conducted by federal agents from the summer of 1982 to April 1983. On April 6, 1983 agents concluded from the pattern of vehicular activity that defendants were observed to engage in that a sale of drugs was imminent. Accordingly, they arrested them on the afternoon of April 6 and conducted searches of a green Dodge camper, a white Ford truck, a garage at 15 Sylvester Road, Dorchester, Massachusetts, and a warehouse at 345 D Street, South Boston, Massachusetts. All four searches uncovered large amounts of baled marijuana.

Moscatiello, Rooney, Carter, Murray, and Barrett were charged two weeks later in a five-count indictment for various drug violations. Courts I and III charged Murray, Carter, Rooney, and Barrett with possessing and conspiring to possess more than one thousand pounds of marijuana in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(6), 846. Counts II and IV charged Murray, Carter, King, and Moscatiello with separate counts of possession and conspiracy in violation of the same provisions of the United States Code. Murray and Carter were charged in Count V with yet another count of conspiracy in violation of 21 U.S.C. § 846. In a superseding indictment, Murray's brother Joseph was added to all five counts.

Appellants moved to suppress the evidence seized in the vehicular and building searches. These motions were denied in a memorandum dated December 23, 1983. Trial was set for January 23, 1984. On that date appellants joined in a motion to dismiss for violation of the Speedy Trial Act. The court, after a preliminary review of the motion and with acquiescence of counsel, reserved its ruling and directed the parties to proceed to trial; the court denied the motion on February 10, 1984. On January 23, Rooney and Moscatiello entered conditional pleas of guilty to count IV, reserving their objections to the court's rulings on the two motions. The other two appellants, Murray and Carter, were found guilty of counts I and II, respectively, after a jury trial.

All four appellants appeal from the district court's denial of their motion to dismiss for violation of the Speedy Trial Act, as well as from the court's refusal to suppress the seized evidence. We affirm.

I. THE SPEEDY TRIAL ACT

The Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, provides that the trials of defendants who plead not guilty shall commence within 70 days of their indictment. 18 U.S.C. § 3161(c). In computing the seventy-day period, the Act provides for certain exclusions as follows:

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(f) delay resulting from any pretrial motion from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of such motion;

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

(8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

18 U.S.C. § 3161.

Defendants were indicted on April 20, 1983. Trial began on January 23, 1984, some 278 days later. The parties are in agreement that 173 of those days are clearly excludable, leaving an excess of 35 days over the permitted 70.

The period whose excludability remains in controversy runs from October 17 to December 23, 1983. On October 17, the district court completed hearings on the several motions to suppress filed by the defendants on May 9 and took them under advisement. The court decided these motions on December 23, 1983. Also pending before the court on October 17 were motions for severance, for orders *in limine*, for election of counts, and for controlling the sequence of the government's presentation of evidence, all of which were also filed on May 9; no hearing was held on these latter motions, which were not decided until on or after December 23, 1983.

Pursuant to 18 U.S.C. § 3161(h)(1)(J), the district court excluded the 30 days between October 17 and November 16 as time during which, the motions to suppress "were actually under advisement by the court." Appellants object on the ground that the court made no showing that it was actually considering the motions on every one of the excluded 30 days.

Arguing that such a showing is necessary for an exclusion under § 3161(h)(1)(J), appellants direct our attention to the report of the Senate Judiciary Committee, accompanying the Senate version of the Speedy Trial Act of 1974. The Committee amended the bill to exclude time "reasonably attributable to delays during which a matter is actually under advisement," S. Rep. No. 1021, 93d Cong., 2d Sess. (1974), *reprinted in* A. Partridge, Legislative History of Title I of the Speedy Trial Act of 1974, at 104 (1980), in response to a suggestion by the Justice Department that the committee resolve an ambiguity in the bill's original language as to the time covered by the exclusion for a "proceeding concerning the defendant." The Committee report cautioned that the Committee did not intend

> "in adopting this amendment to give a blanket exception to matters under advisement[,] for the time excluded must be reasonably attributable' and the matter must be 'actually under advisement.' There-

> fore, the judge must be actually considering the question, for example, conducting the research on a novel legal question."

Id.

Appellants would have us conclude from this that, absent precise judicial findings showing that the court had actually spent each of the days sought to be excluded working on a motion, the exclusion is not allowable.

Like the Eleventh Circuit, we are not persuaded by this argument. *See United States v. Mers*, 701 F.2d 1321, 1338-39 (11th Cir.) *cert. denied.*, ___ U.S. ___, 104 S.Ct. 481, 78 L.Ed.2d. 679 (1983). The "actually under advisement" language in the statute, and the phraseology of the Committee report, do not specify that, in addition to having a matter under advisement, the court must demonstrate that it was working on it each of the days sought to be excluded. Such a requirement would be unprecedented and impracticable. It is, moreover, belied by other parts of the legislative history. The language of the Senate bill was amended before passage by the House of Representatives, which added the phase, "not to exceed thirty days" to § 3161(h)(1)(J). According to the report prepared by the House Committee on the Judiciary, [t]he amendment was adopted at the suggestion of Detroit defense attorney Mr. Barris, who said:

> Now, I think the language which is now contained within the bill is that a reasonable time should be allowed when a matter is held under advisement by the district judge. This, of course, is a very flexible term, term "reasonable," and I would suggest that a period of 30 days after all oral argument is heard and all briefs have been submitted on the matter under advisement is not an unreasonable period in which the district judge could act, I do not think that this would compel the judge to reach on any particular issue an improvident answer merely because he is held to a time limit of 30 days. And yet, if such a provision or restriction were written into the Act, it would ef-

> fectively plug up one of the loopholes which I conceive to now exist whereby a district judge were he prone to do so, could well "sit on a mater" for an indefinite period of time and thus rather effectively defeat the purposes of the bill.
>
> The Committee concurs with the views of Mr. Barris and also with the Alaska speedy trial rules of court, which provide that no pre-trial motion shall be held under advisement for more than 30 days. This modification in no way affects the prerogative of the court to continue cases upon its own motion where, due to the complexity or unusual nature of the case, additional time is needed to consider matters before the court, as set forth in section 3161(h)(8). It should also be noted, however, that in such cases the court must set forth with particularity reasons for granting such a motion.

H. Rep. No. 1508, 93d Cong., 2d Sess., *reprinted in*, 1974 U.S. Code Cong. & Ad. News 7401, 7425-26.

Two conclusions emerge from a reading of this part of the report. First, the House Committee understood the Senate bill to permit a judge to "sit on" a proceeding indefinitely, an interpretation incompatible with an understanding of the "actually under advisement" language that would only allow the exclusion of time actually spent on research, writing, or reflection. Second, the committee contrasted delays of less than 30 days under the present § 3161(h)(1)(J) with further delays excludable only under the continuance provision of § 3161(h)(8); in the latter case, the committee notes, "the court must set forth with particularity reasons for granting such a motion." We infer that no elaboration of findings or of reasons was thought to be required for § 3161(h)(1)(J) exclusions, which were automatically limited by the 30 day period.

We accordingly hold that the full 30 days between October 17 and November 16 during which the suppression motions were under advisement is excludable under § 3161(h)(1)(J). This still leaves the total of nonexcluded days

at 75, or 5 over the statutory limit. The district court explained its exclusion of the remaining time until the suppression motions were decided on December 23, 1983, as follows:

> The defendants had also filed a large number of other motions, for severance, for orders *in limine*, election of counts, and for controlling the sequence of the government's presentation of evidence. These motions were pending during consideration of the motions to suppress evidence.
>
> No hearing was held before me on these matters. I did not consider them or take them under advisement until after I had decided the motion to suppress on December 23, 1983. They are therefore not subject to the thirty day provision of § 3161(h)(1)(J) but to the reasonable time requirement implicit in § 3161(h)(1)(F). . . .
>
> These motions primarily concerned the ordering of the trial. The summary judgment [sic] motion, however, was dispositive. If it had been allowed, the government would not have been able to go forward with trial. I conclude that it was reasonable to hold these motions until I had decided the motion to suppress.
>
> Even though the motion to suppress was under advisement for longer than the permitted *excludable* time of thirty days, it was not held an unreasonable time in my view given the complexity of the testimony and the difficulty of determining the extent to which subjective judgment, albeit expert, should support a finding of probable cause. While the Speedy Trial Act is intended to discourage obsessional delay, it should not be interpreted to discourage thoughtful consideration by the district judges of difficult questions.

We agree that the period through December 23, 1983, during which the remaining (non-suppression) motions were pending was excludable under § 3161(h)(1)(F). It was reasonable for the court to have withheld decision on these motions until it could decide the suppression motions. These remaining motions, as Judge Skinner stated, "primarily

concerned the ordering of the trial." Had the suppression motions been sustained, the prosecution might not have had sufficient evidence to go forward, rendering the procedural motions moot. And while the time spend deciding the suppression motions was greater than the 30 days for which credit is automatically allowed under § 3161(h)(1)(J), it was not unreasonable, in light of their multiplicity and obvious complexity (as reflected, infra, in the present opinion.)

This case is on all fours with our recently decided case of *United States v. Anello*, 765 F.2d 253, 256-258 (1st Cir. 1985), where we excluded time in excess of 30 days reasonably spent in deciding multiple suppression motions that as a practical matter had to be decided prior to other pending motions. Following *Anello*, we affirm the district court's exclusion of such time here.

We conclude that the total nonexcludable time amounted to 45 days, and that the Speedy Trial Act was not violated.

II. SEARCH AND SEIZURE ISSUES

Critical to the resolution of this appeal is a determination of whether there was probable cause to seize or search without warrant the two vehicles at issue—a green camper and a white truck, and by extension, whether there was probable cause to issue search warrants for two buildings—a garage and a warehouse. First, we will set forth a brief summary of the key events of April 6, 1983, the day the contested searches and seizures took place, based on fact findings of the district court.

At approximately 2:25 p.m., federal agents stopped a green Dodge camper driven by Moscatiello and a red Cherokee jeep driven by King at the Allston Toll Plaza on the Massachusetts Turnpike. Both defendants were placed under arrest. Upon entering the cab of the camper to move it to the roadside, DEA Special Agent Powers observed through a rear window of the cab that the camper area contained burlap-covered bales, which he knew to be a common packing for marijuana. Powers immediately broad-

cast to the other agents his observation of the bales. The camper was then impounded, a search warrant was eventually obtained, and a search of the bales pursuant to this warrant disclosed that they indeed contained marijuana.

At 2:30 p.m., Rooney, who had been followed from the Northern Avenue area, drove a white Ford truck into the driveway of a garage. As Rooney got out of the vehicle he was placed under arrest. One of the agents on the scene indicated he noticed an odor of marijuana coming from the truck. Another agent removed a set of keys from Rooney's hands at the time of his arrest and DEA Special Agent Boeri used one of the keys to unlock the rear door of the truck. Upon opening the door, the agent observed approximately 60 bales of marijuana. After the agents seized the car, the bales were examined some 18 hours later, without obtaining a warrant in the interim.

Based on the discovery of marijuana in the green camper and white truck, federal agents later obtained a warrant to search the garage at 15 Sylvester Road.

During the course of the April 6 surveillance, federal agents observed the white truck and green camper enter the cinder block warehouse at 345 D Street, then exit some 20 minutes later. Agents at that time also observed two men inside the building. After seizing the truck and camper, as well as the blue van shortly after the seizure of the camper, and after arresting the occupants of those vehicles, Carter, Murray, Rooney, and Moscatiello, agents converged on the warehouse. There they observed a short white male, approximately 45 years old, pacing back and forth on D Street in front of the white cinderblock building, looking at traffic as it passed. After agents drove around the block, the man was no longer seen outside the building.

At approximately 2:40 p.m., other agents arrived on the scene and attempts were made to determine if anyone was in the building at 345 D Street by knocking and then banging on the entry door and on the large, overhead doors. Agents went around the building to look through

a window but could not see the general interior of the building. At all stages of this process, the agents regularly stated their identities as federal law enforcement agents. Finally, the agents made a forced entry of the building. After a brief view of the premises, they determined that no one was inside, detected a strong odor of marijuana, and observed many burlap-wrapped bales which they believed to contain marijuana. The building was then secured and guarded from the outside.

A search warrant for the warehouse was executed at 11:00 p.m. that evening. In their application to the magistrate for the warrant, the agents disclosed and relied *inter alia* on their search of the truck and their seizure of the camper, but neither disclosed their forced entry into the warehouse nor made use of the fruits of that entry. The later search of the warehouse pursuant to the warrant uncovered in addition to the marijuana, a red and a blue spiral notebook, tape dispensers, marking pens, and marked pieces of tape that had been affixed to the bales of marijuana.

A. VEHICLE SEARCHES

Appellants Moscatiello and Rooney contend that both the warrantless stop and seizure of the green camper and the stop and search of the white truck violated the fourth amendment, and that therefore the bales of marijuana found in those vehicles should have been suppressed as tainted fruits of those searches. We find no merit in this contention. We agree with the court below that when the agents stopped and entered the green camper, they had probable cause to believe that contraband was being transported in it and were therefore empowered both to stop and search it under the so-called automobile exception to the warrant requirement under the fourth amendment.[1]

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[1]In his brief, Moscatiello argues from the district court's consistent reference to the "search" of the White Ford truck and the "seizure" of the green Dodge camper that the court rejected the government's assertion that it had probable cause to *search* the camper before federal agents seized it at the toll plaza. We find no merit in the contention.

See, e.g., United States v. Ross, 456 U.S. 798, 825, 102 S.Ct. 2157, 2173, 72 L.Ed.2d 572 (1982); *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). Armed with the additional evidence of marijuana in the green camper, the agents had ample probable cause to search the white truck as well.

In viewing the district court's determination of probable cause, we of course look at the facts in the light most favorable to the court's ruling and accept the court's findings unless they are clearly erroneous. *See United States v. Patterson*, 644 F.2d 890, 894 (1st Cir. 1981); *United States v. Jobin*, 535 F.2d 154 (1st Cir. 1976); 3 C. Wright, Federal Practice and Procedure § 678, at 805 & n. 24 (2d ed. 1982) (citing cases). To find probable cause, a court can rely on an "assessment of probabilities in particular factual contexts" that criminal activity may be taking place. *Illinois v. Gates*, 462 U.S. 213, 232, 103 S.Ct. 2317, 2328, 76 L.Ed.2d 527 (1983). Here the district court relied on the totality of the circumstances—reliable informant information linking the various codefendants to an ongoing drug ring, coupled with detailed surveillance observations of suspicious vehicular activity—to establish probable cause. While the district judge noted that neither class of evi-

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The court doubtless distinguished the "search" of the white Ford truck from the camper because the former was searched immediately while the latter was obtained. But there is no reason to distinguish the facts which would provide probable cause to seize the vehicle from those which would provide probable cause to search it: for both purposes it was necessary to find that it was likely being used to transport illegal drugs.

Moscatiello also reads the court's conclusion that it was "persuaded that the officers were justified in arresting the defendants, searching the white Ford truck and seizing the green Dodge camper" as equating the question whether there was probable cause to seize the camper with whether there was probable cause to arrest Moscatiello. Moscatiello then tries to show that the agents lacked probable cause to arrest him. We see no reason to consider the arrest question. As there was probable cause to have seized and searched the vehicle in which he was riding, the court had ample basis for refusing to suppress the contraband which was discovered in the camper.

dence would have sufficed by itself, put together they made a strong case for finding probable cause.

The informant evidence came from three separate sources. Informant Glen Castro described his own personal involvement in conversations and drug interactions with Rooney and Barrett during the first part of 1982. These included Rooney's delivery to Castro of a bale of marijuana a conversation with Barrett where Barrett described the counting of $1 million in drug money, a conversation with Barrett where Barrett indicated he was in charge of a drug operation (at this meeting some $700,000 was in plain view), and generally, the joint involvement of Rooney, Barrett, and others in drug traffic.

A second informant, who had provided reliable information to the FBI in the past, told an agent that Barrett was selling marijuana and cocaine out of his home in April, 1982 and had a large supply of both drugs in his living-room.

A third informant described conversations between Barrett and Joseph Murray in March, 1983 about an incoming marijuana shipment, and averred in a general way that Barrett was part of the "Joe Murray crew", a group known to the FBI as involved in various criminal activities. The third informant connected Barrett to a Ronald Barton, who had been arrested in connection with a purchase of marijuana from an undercover agent in February, 1983. The proposed plan involved the use of a rental truck as a means of transferring marijuana. Although Barton was not convicted, the informant said that he was in fact part of "Mr. Barrett's operation" for marijuana sales.

Rooney contests the reliability of the information the government gained from its informants. Rooney notes that the information provided by two of the informants concerned defendants' activities in April, 1982, a year before their arrests. One of the two, Glen Castro, was serving time for bank robbery when he provided the information. The third informant's information concerned events in February and March of 1983, but the government had no

independent confirmation of his reliability, and much of his information was single or multiple hearsay.

These objections are not persuasive. Although a convicted felon, Castro gave very detailed information, asserted to be from first-hand, the tenor of which was substantially corroborated by the two others. The second informant, who corroborated Castro's information as to Barrett, had a track record of reliability. Although both his and Castro's information concerned events in April, 1982, the association of Barrett and Rooney with Barton, who was arrested on an unrelated drug charge but later released, was confirmed by surveillance within a matter of months. While the third informant's information was mostly hearsay, it was not entirely so and was in some respects corroborated by the results of surveillance.

To be sure, the informants' evidence related to drug dealings sometime before the challenged searches. But it was verified and, as it were, updated by the surveillance evidence, which indicated that, right up to their arrests, Rooney and Barrett were up to their old tricks.

And the kind of criminal conduct related by the informers was not the kind which became stale overnight. As one court has stated,

> The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock: the character of the crime (chance encounter in the night or regenerating conspiracy?), of the criminal (nomadic or entrenched?), of the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), of the place to be searched (mere criminal forum of convenience or secure operational base), etc. The observation of a half-smoked marijuana cigarette in an ashtray at a cocktail party may well be stale the day after the cleaning lady has been in; the observation of the burial of a corpse in a cellar may well not be stale three decades later. The hare and the tortoise do not disappear at the same rate of speed.

Andersen v. State, 24 Md.App. 128, 331 A.2d 78 (1975), *aff'd*, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976).

The informant evidence in the present case is far more like a tortoise than a hare. A drug enterprise involving a network of suppliers, distributors, and customers is not created and then willingly dismantled the next day. Assuming, as the informants said, that defendants were operating out of a garage in South Boston, and were dealing extensively in marijuana, a valuable and bulky commodity, early in 1982, it would be reasonable to assume they were still doing the same a year later.

Verification through surveillance began as early as July or August of 1982. The informants' information as to the regular association of Rooney and Barrett was confirmed, as was their occasional association with Barton and with the Murrays. Meetings among Rooney, Barrett, Barton and the Murrays were observed in the vicinity of the Pier Restaurant on Northern Avenue. Independent information received from state and local officials in March, 1983 indicated that there was a warehouse somewhere in South Boston which was used to store marijuana, though several possible locations for the warehouse furnished by the officials proved to be inaccurate.

On April 5 and 6, 1983, the agents observed defendants to be engaged in a complex pattern of vehicular activity which included trips by the white Ford truck, the green camper and the blue van to a garage and into a warehouse under circumstances suggesting that they were being loaded there, followed by trips under close escort of other vehicles to possible distribution points. The district court made detailed findings about these actions which we need not repeat here. It is enough to say that defendants met with one another, on occasion exchanged vehicles and keys, and drove about in various combinations of vehicles. For example, the white Ford truck was observed to back up to a garage at 15 Sylvester Road, where objects were placed on either side of it, obstructing the view into the garage. When the truck left the garage it was closely

followed by Barrett in an automobile, and when the truck stopped at Santoro's subshop, Barrett passed, did a U-turn, and parked by its side. A similar pattern consistent with the transport and delivery of some highly valued substance occurred with respect to the blue van and, later, the white Ford truck and green camper, this time at a cinder block building, the doors of which were opened to admit the vehicles by persons inside, and then closed. A tractor trailer rig was observed inside with a large dark colored contained on top. Certain agents who testified at the trial opined, in light of specialized knowledge of drug trafficking, that certain of the observed practices, e.g., the following of the trucks by an escort car at such a close distance as to prevent the intervention of another vehicle, were typical of drug operations. Nothing suggested that defendants were engaged in an ascertainable legitimate business.

In the context, in which it arose, the surveillance evidence provided convincing indicia of drug trafficking. Given the informants' evidence that Barrett, Rooney and the Murrays had been dealing in marijuana and cocaine on a systematic basis, it provided powerful reason to believe that all defendants were doing precisely what, in fact, they were doing. Even an unsophisticated observer lacking the prior information would have suspected the actions of men rushing about in a mini-fleet of vehicles between a garage and warehouse in the manner described. Sophisticated observers, such as drug agents, were entitled to draw even more precise inferences, as "[c]onduct innocent in the eye of the untrained may carry entirely different messages to the experienced or trained observer." *United States v. Woolery*, 670 F.2d 513, 515 (5th Cir.) (quoting *United States v. Clark*, 559 F.2d 420, 424 (5th Cir. 1977), *cert. denied*, 459 U.S. 835, 103 S.Ct. 78, 74 L.Ed.2d 75 (1982); *accord United States v. Manchester*, 711 F.2d 458, 461 (1st Cir. 1983).

Rooney and Moscatiello question the basis for Agent Keaney's testimony that the traffic was of a kind frequently employed during the transportation of drugs. Mos-

catiello argues that no foundation was laid for Keaney's testimony to that effect; however, Moscatiello's brief itself cites to Keaney's testimony that he had conducted "numerous" vehicle surveillance, during several of which "multiple vehicles [were] used . . . for counter-surveillance [or] for security." Rooney suggests that the proper universe of experience is not all drug trafficking, in which the use of multiple vehicles for surveillance or security might indeed be common, but drug trafficking in the Northeast, where, to Keaney's own knowledge, no drug hijackings had occurred. But the fact that Keaney knew of no hijackings in the Northeast does not imply that he could not infer that the second vehicles were serving a security or counter-surveillance function; whether or not hijackings were common, defendants might still regard the risk as worth protecting against, and it is hard to think of any innocent activity which would have induced each precautions.

Rooney argues that the vehicles used by defendants were occasionally seen traveling alone. We do not find these observations inconsistent with Keaney's theory, which only demands that vehicles travel in groups when actually transporting marijuana.

Rooney also makes other arguments, none of which we find convincing. We add that while the driving of vehicles in tandom undoubtedly strengthened the inference of drug smuggling, it was by no means the only basis for such an inference. The shuttling of vehicles back and forth from the garage and the cinder block warehouse, the entire modus operandi of a group at whose center were men who were known drug smugglers, could reasonably be explained only as the agents in fact did explain these actions.

Rooney contends that the government lacked probable cause, on the authority of *United States v. Freitas*, 716 F.2d 1216 (9th Cir. 1983), a case also involving multiple informants and corroborative surveillance. While the facts found insufficient to support a determination of probable cause in *Freitas* bear some resemblance to those in the

present case, the quality of the informants' tips in *Freitas* was significantly inferior to that of Castro's in that neither of the *Freitas* informants' tips disclosed the basis for its information; Castro, on the other hand, indicated that he himself had received drugs from Rooney. Since the court in *Freitas* noted that if an "informant [speaks] with personal knowledge, then the information is usually deemed reliable enough to support a finding of probable cause," *id.* at 1221, it seems likely that the *Freitas* court, which found the probable cause determination a "borderline" one, *id.* at 1224, would regard the fact that Castro indicated that he spoke from personal knowledge sufficient to tip the scales in the present case the other way. In any event, we are not necessarily bound by the views of the *Freitas* panel.

We conclude that there was ample probable cause for the stop and seizure of the green camper. It follows then that the same facts, with the addition of the sighting of the bales in the green camper, also furnished probable cause to search the white truck. The main argument which Rooney offers to distinguish the search of the white truck is that the vehicle was parked on private property at the time it was subject to a warrantless search. We find, however, that the fact of being parked on private property did not suffer to exempt the vehicle from being searched where probable cause otherwise existed.

Rooney finds some support for his position in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). In that case, defendant was arrested inside his home on murder charges, and his cars, which were parked on his driveway, were towed to the police station to be searched. In an opinion attracting only four votes, Justice Stewart held that the search of the impounded car fell outside the automobile exception to the warrant requirement because, *inter alia*, the need to search the car did not arise suddenly at the time of Coolidge's arrest, objects sought were not contraband, the cars were unoccupied and on private property, and Coolidge could not have gained access to the vehicles to destroy evidence.

However, our case is clearly distinguishable. In sharp contrast to the facts in Coolidge, here the agents who arrested Rooney searched the truck immediately after pursuing the defendant to the garage site on the reasonable belief that it contained contraband. Moreover, Coolidge's car had been parked in the driveway of his own home while Rooney was temporarily parked on property, which albeit private, was not *his* property; therefore, he cannot derive any greater expectation of privacy from that fact than if the vehicle had been parked in a public place. Although Rooney attempts to draw a bright line between vehicles on private property and those on public property, thee is a clear distinction between a search of a car that the police had pursued onto private property and one that was long unoccupied and parked in a driveway for a period of time.

As the opinion in *California v. Carney*, ___ U.S. ___, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985), which extends the automobile exception to mobile homes, makes clear, the inherent mobility and pervasive regulation of vehicles form the bases for a reduced expectation of privacy. *Carney*, rather than supporting the public/private distinction advocated by Rooney, merely confirms the special fourth amendment treatment accorded the search of vehicles.

Finally, although it is perhaps true that the FBI agents who arrested Rooney could have blocked off the driveway and immobilized the white truck, and so one of the reasons given in *Coolidge* for not permitting a warrantless search would apply here, the continued vitality of that particular reasoning is doubtful. That section of the *Coolidge* opinion commanded only four votes. Moreover, the Court in *Ross*, in explaining how the rationale for allowing the warrantless *seizure* of an automobile—that it might be driven away before a warrant could be obtained extended to the *search* of the interior of its seats—found that the minimal increase in intrusiveness inflicted by searching a car immediately instead of impounding it and seeking a warrant simply was not of constitutional significance. *Ross*, 456 U.S. at 807 n. 9, 102 S.Ct. at 2163 n. 9.

We hold, therefore, that probable cause to believe that Rooney was using the white truck to transport contraband sufficed to support the seizure and search of the truck. Moreover, under *Ross*, a search of the entire vehicle, including, the examination of any closed container that may conceal the object of the search is permissible. *Ross*, 456 U.S. at 825, 102 S.Ct. at 2173. The fact that the bales found in the white truck were not examined until 18 hours later does not render the search illegal in light of the recent Supreme Court decision, *United States v. Johns*, _ U.S. ___, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985), holding that a delay of three days before searching containers from impounded trucks was reasonable. *See United States v. McHugh*, 769 F.2d 860 (1st Cir. 1985) (a search of bales of marijuana seven days after the seizure of the truck in which they were contained is permissible). We conclude that no violation of the fourth amendment was committed in the warrantless search and seizure of the white truck.

B. SEARCH WARRANTS

Given the combination of the informant information and corroborated surveillance and since we hold the probable cause existed to search the white truck parked in the driveway of the garage, we also hold that there was ample probable cause to support the issuance of the warrant to search the garage itself and that the search pursuant to the warrant was permissible.

The issue of the validity of the search warrant for the warehouse, however, merits more discussion. In its Memorandum and Order on Various Motions of the Defendants to Suppress and to Dismiss, the district court held that none of the defendants had standing to contest the legality of the search of the warehouse. The court also ruled that the warrant to search the warehouse was legal since it rested on a showing of probable cause that was independent of and untainted by the prior illegal entry, noting that the omission of any references to the earlier search in the affidavits did not affect the magistrate's decision by enhancing the affidavits' content. The court admitted not only the evidence discovered for the first time *after*

issuance of the warrant but also evidence of the bales which were in plain view when the agents made their initial warrantless entry of the warehouse and, of course, remained there until a full search took place pursuant to the warrant that had been subsequently obtained.

Murray and Carter urge us to suppress all evidence seized in the warehouse as the product of an illegal search. They argued that they both had a reasonable expectation of privacy in the warehouse, and that therefore the trial court erred in holding that they lacked standing to contest the legality of the searches. They further assert that the search warrant for the warehouse was tainted by the agents' failure to mention the earlier warrantless search of the warehouse, requiring the suppression of all evidence seized at the warehouse; in the alternative, they argue that any evidence observed in plain view during the initial unauthorized entry, i.e., the bales wrapped in burlap, must be suppressed as the direct product of a fourth amendment violation even if the later search made pursuant to the warrant was untainted. The government contests each of these arguments, and in addition replies that exigent circumstances justified the entry into the warehouse without a warrant.

1. Standing

We believe the court erred in ruling that "[n]one of the defendants have standing to challenge the search of the warehouse, which was owned by a corporation, in the absence of any evidence that any portion of the warehouse was set aside for the personal use of any defendant as corporate officer, employee or financial backer." The lower court's reasoning seems to have been that the fourth amendment affords a defendant no protection unless he either owned the warehouse personally or used some portion of it for his personal use. But there was ample evidence to indicate that Murray and Carter had "a legitimate expectation of privacy in the area searched." *E.g., United States v. Salvucci*, 448 U.S. 83, 92, 100 S.Ct. 2547, 2553, 65 L.Ed.2d 619 (1980).

In *Mancusi v. DeForte*, 392 U.S. 364, 88 S.Ct. 2120, 20 L.Ed.2d 1154 (1968), state officials, acting without a warrant, searched the union office shared by DePorte, a union official, and several other union officials. The Court rejected arguments that DeForte lacked standing to object to the admission of papers seized during the search because the place searched was not his home, or because he had no proprietary interest in his office, or because he shared the office with other officials. The court, per Justice Harlan, concluded that DeForte "could reasonably have expected that only those persons and their personal or business guests would enter the office, and that records would not be touched except with their permission or that of union higher-ups." *Id.* at 369, 88 S.Ct. at 2124.

In the present case, Murray testified that he, Murray's brother, and defendant Carter each put up $20,000 to acquire the warehouse and that the three of them, along with one William Rae, held the stock of Harbor Oil, Incorporated, the corporation that held title to the warehouse, although only the Murrays' names appear on the mortgage used to finance the rest of the warehouse's purchase price. Thus, Murray and Carter, unlike DeForte, had, through their close corporation, a proprietary interest in the searched premises.

More importantly, only the Murrays and Carter had keys to the warehouse, and they testified that the warehouse was kept locked, as agents found it prior to the warrantless search; the number of persons afforded access to the warehouse would seem considerably smaller then the number of officemates, union superiors, and invitees that had access to DeForte's office. Murray and Carter also kept personal property in the warehouse, including a jacket found by the agents with $1,000 in the pocket (not to mention the large quantity of marijuana), further indicating an expectation of privacy. We therefore hold that Carter and Murray had standing to contest the search of the warehouse.

2. Exigent Circumstances

The government replies that even if Carter and Murray have standing to contest the initial entry of the warehouse, exigent circumstances made the warrantless search and seizure legal; specifically, that, had the agents not entered when they did, they would have run a significant risk that evidence would have been destroyed before a search pursuant to a warrant could have been effected. We held in *Archibald v. Mosel*, 677 F.2d (1st Cir. 1982), that law enforcement officials may conduct a warrantless search that would otherwise be illegal if they have a reasonable perception that exigent circumstances obtain. It is difficult, however, for us to deal with this issue on the record and findings as they presently stand. The district court made no findings on the question of exigency, and while we do not rule out all possibility that the risk of destruction of evidence inside the warehouse was so great as to allow a warrantless entry, the government's position is uphill and, absent findings by the lower court, we are loath to conclude that exigent circumstances existed as now argued. We accordingly do not reach the government's claim of exigency but turn directly, as did the district court, to the question of whether or not to suppress the evidence found in the warehouse on the assumption, *arguendo*, that the warrantless entry was in violation of the fourth amendment.

3. The Exclusionary Rule

Even assuming that the original, warrantless, entry into the warehouse was illegal, we are not required to invoke the exclusionary rule. Since *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392, 40 S.Ct. 182, 183, 64 L.Ed. 319 (1920), the Supreme Court has recognized that evidence obtained through an independent, lawful source need not be suppressed even if the police were also led to it through means that violated the fourth amendment or some other constitutional guarantee. The theory behind this rule is clear, where the evidence was discovered through an untainted source and would have been discov-

ered even if the illegality had not occurred, the evidence is not a fruit of the illegality. *Cf. United States v. Leon*, ___U.S. ___, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

In *Segura v. United States*, ___ U.S. ___, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984), the Court was faced with a sequence of an illegal entry followed by a legal one strikingly similar to the present one. In *Segura*, New york Drug Enforcement Task Force officers investigating a cocaine ring stopped two of the suspects and found them to be carrying cocaine. Agents were then authorized to arrest petitioners Segura and Colon and secure Segura's apartment to prevent the destruction of evidence, even though, they were told, a search warrant probably could not be obtained until the next day. At 7:30 that evening, agents established external surveillance of Segura's apartment. At 11:15, Segura entered the lobby of the building. Agents then took him to his apartment and knocked at the door. When a woman later identified as Colon answered the door, agents entered the apartment without requesting or receiving permission, and without having obtained a warrant. Agents conducted a security check of the premises, observing in the process several items of drug paraphernalia; none of the items found was disturbed. Agents took Segura and Colon to DEA headquarters, leaving two agents behind to secure the premises until a search warrant could be obtained. After the warrant was issued at 6:00 p.m. the following day, a search was conducted that turned up a kilo of cocaine and records of drug transactions.

At trial, the district court ruled that no exigent circumstances justified the initial entry. Finding the first entry illegal, and the evidence observed in the security search its direct fruit, it ordered that evidence suppressed. Although it found the warrant authorizing the later search to be valid, it also ordered the evidence found in the later search suppressed, since, but for the illegal entry and subsequent occupation of the apartment during the 19 hours between the initial entry and the issuance of the search warrant, the evidence might have been removed or de-

stroyed; thus, the later-discovered evidence was also "fruit of the poisonous tree." On appeal, the second circuit affirmed as to the first evidence but reversed the holding requiring the suppression of evidence not in plain view, concluding that to indulge in the speculative possibility that the evidence might have been removed or destroyed to control the admissibility of the later evidence would be "prudentially unsound."

The defendants sought review in the Supreme Court solely on the question of whether the evidence uncovered during the later search should have been suppressed; the government did not seek review. In the part of its opinion that commanded a majority, the Court simply held that

> "[w]hether the initial search was illegal or not is irrelevant to the admissibility of the challenged evidence because there was an independent source for the warrant under which that evidence was seized.
> . . .
> . . . Had police never entered the apartment, but instead conducted a perimeter stakeout to prevent anyone from entering the apartment and destroying evidence, the contraband now challenged would have been discovered and seized precisely as it was here.
> . . .
> . . . [O]ur cases make clear that evidence will not be excluded as 'fruit' unless the illegality is at least the 'but for' clause of the discovery of the evidence." *Segura*, 104 S.Ct. at 3391.

As for the evidence uncovered for the first time during the warehouse search conducted pursuant to the warrant, *Segura* is on all fours and we necessarily affirm the denial of defendants' motion to suppress. Defendants argue that because the application for the warrant fails to mention the prior entry, the warrant was therefore tainted by the prior illegality. The district court properly rejected this argument for the reason that, absent fabrication of evidence, *see Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), the mere omission of irrel-

evant facts from an affidavit constitutes no reason to suppress the warrant. The omission did not "enhance the contents of the affidavit," *United States v. Strini*, 658 F.2d 593, 597 (8th Cir. 1981), nor deceive the magistrate into granting a warrant he would otherwise not have issued, *United States v. Lewis*, 621 F.2d 1382, 1389 (5th Cir. 1980) *cert. denied*, 45 U.S. 935, 101 S.Ct. 1400, 67 L.Ed.2d 370 (1981). The fact of the illegal entry did not detract from the evidence related in the application of the overwhelming probable cause that existed antecedent it.

A harder question is whether the district court should have suppressed the evidence—the marijuana bales—that was in plain view at the time of the illegal entry. As noted earlier, the Supreme Court in *Segura* was not obliged to address whether the evidence observed during the initial illegal search had been erroneously suppressed by the lower courts. As the dissent in *Segura* points out, however, the logic of the majority's reasoning applies equally to the evidence uncovered in the first search as to evidence uncovered in the second: "[t]he warrant provided an 'independent' justification for seizing all the evidence in the apartment—that in plain view just as much as the items that were concealed." *Segura*, 104 S Ct. at 3400 (Stevens, J. dissenting). That argument is particularly strong in the present case where, unlike in *Segura*, agents entering the premises found them to be deserted, and hence the possibility seems nil that the evidence in plain view would or could have been removed or destroyed before the second search had the illegality not occurred. Put another way, we can be absolutely certain that the warrantless entry in no way contributed in the slightest either to the issuance of a warrant or to the discovery of the evidence during the lawful search that occurred pursuant to the warrant.

In a closely analogous situation, the Court has recently indicated that it will adhere to the independent justification analysis, ruling that where the location of a body was learned from the defendant through an interrogation in violation of *Miranda*, and the body was found pursuant to the defendant's information, the body need not be sup-

pressed where the prosecution demonstrated that the body would inevitably have been discovered through a sweep search that was already underway. *See Nix v. Williams*, ___ U.S. ___, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984).

We realize that lower courts presented with the present issue have decided that evidence observed in an illegal search that was also observed and seized in a later search must be suppressed. *See United States v. Griffin*, 502 F.2d 959 (6th Cir.), *cert. denied*, 419 U.S. 1050, 95 S.Ct. 626, 42 L.Ed.2d 645 (1974); *see also Commonwealth v. Benoit*, 382 Mass. 210, 415 N.E.2d 818 (1981) (evidence found as direct product of illegal warrantless search not subject to argument that without search, evidence would inevitably have been discovered through a later search pursuant to a warrant). Arguably the Supreme Court in *Segura* also hinted at this result when it stated that "evidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion." 104 S.Ct. at 3386. Since the chief, and perhaps sole, rationale for the exclusionary rule is to deter future violations of the fourth amendment, *see Leon*, 104 S.Ct. at 3412 (decided same day as *Segura*), arguably all evidence first spied through illegal procedures must be suppressed, no matter how "inevitable" its later, legal, discovery. But the reasoning in *Segura* and, certainly, that in *Nix*, lead us to conclude that the marijuana in plain view here upon entry should not be suppressed. This is as clear a case as can be imagined where the discovery of the contraband in plain view was totally irrelevant to the later securing of a warrant and the successful search that ensued. As there was no causal link whatever between the illegal entry and the discovery of the challenged evidence, we find no error in the court's refusal to suppress.

C. USE OF THE BLUE AND RED NOTEBOOKS AT TRIAL

During the second search of the warehouse at 345 D Street, agents discovered approximately 500 bales of marijuana. Each bale was marked with a piece of tape bearing two numbers. The numbers on the left of the tape iden-

tified the bales; the numbers of the right indicated approximately the weight of each bale.

Agents also seized a red and a blue notebook at the warehouse. The red notebook contains 28 pages with writing on them. Seven of the 28 have a name or apparent name at the top, one of which is "Omar"; six of the seven also have a single list of numbers below the name, which matches the numbers on bales seized during the various searches. The remaining 21 pages contain two columns of numbers. The numbers in the left column run sequentially from 1 to 505; the numbers on the right correspond approximately to the weight of the bales bearing the numbers in the left column. A torn piece of notebook paper matching the paper in the red notebook, with a matching pattern of numbers, was seized from the pocket of James Carter at the time of his arrest. The pages of the red notebook bear the fingerprints of James Carter, Michael Murray, and Joseph Murray.

The blue notebook contains one page of writing, on which the name "Omar" appears. That page also bears James Carter's fingerprints.

The trial court admitted the red notebook into evidence under Fed.R.Evid. 801(d)(2)(E), ruling that there was "a reasonable expectation that [it] might be able to find, at the end of the trial, that it was made by somebody who was engaged in a conspiracy with one or more of the defendants." James Carter objects to the admission of the notebook into evidence. In doing so, Carter does not question the authenticity of the notebook under Fed.R.Evid. 901. We therefore assume that the red notebook is indeed what it seems to be: a record of the weights of bales of marijuana and a partial division of the bales among several persons.

Carter instead excepts to the red notebook's admissibility under Rule 801(d)(2)(E), which provides that "[a] statement is not hearsay if—. . . The statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the

conspiracy." Carter argues that the admissibility of the notebook depends on the fulfillment of a prior condition of fact, namely, the fact that it was kept by a co-conspirator, and that therefore, under Fed.R.Evid. 104(b), the notebook was admissible only if evidence was introduced "sufficient to support a finding" that that condition was fulfilled. Since the government presented no evidence that the notebook was kept in a co-conspirator's handwriting, or any testimony by a witness or admission by a co-conspirator that it produced by one of the co-conspirators, Carter argues us to find that the condition precedent to the notebook's admissibility was not met.

But we think Carter's argument and Rule 801(d)(2)(E) are beside the point. In order for a co-conspirator's written statement to be hearsay, and thus to be inadmissible unless defined not to be hearsay under 801(d)(2)(E), the written statement must be a statement. *See* Fed.R.Evid. 801(a) defines a statement to be "(1) an oral or written *assertion* or (2) nonverbal conduct of a person, if it is intended by him as an assertion." The only assertions made in the notebook are that certain bales have certain weights, and that certain bales are assigned to certain persons. There is no issue as to the truth of these assertions, regardless of who wrote them down. Use of the red notebook as real evidence linking Carter and the two Murrays to the marijuana operation does not involve the admission of any statements made in the notebook to prove the truth of the matters they assert, and therefore presents no hearsay problem; since the authenticity of the red notebook is unquestioned, the notebook is clearly admissible for this issue.

The blue notebook was admitted at trial solely for the purpose of connecting Carter to the warehouse by means of the fingerprints found on it. An appropriate limiting instruction was given to the jury. The trial court denied Carter's request that the writing be covered over when the blue notebook was submitted to the jury, reasoning that to do so would invite its curiosity.

Carter argues that the district court's refusal to cover the writing constitutes error. He notes that the name "Omar" appeared on that page, as it did atop a page of bale numbers in the red notebook. We fail to see what prejudice could result from the exposure of the jury to the word "Omar," and we think the trial court's decision simply to give a limiting instruction well within the scope of the discretion accorded it on evidentiary questions. *See, e.g., United States v. Sorrentino*, 726 F.2d 876, 886 (1st Cir. 1984).

Affirmed.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF MASSACHUSETTS CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

v.

JAMES CARTER, *et al.*,

Defendants

CRIMINAL No. 83-102-S

MEMORANDUM AND ORDER ON VARIOUS MOTIONS OF THE DEFENDANTS TO SUPPRESS AND TO DISMISS

December 23, 1983

SKINNER, D.J.

Defendants James Carter, Joseph Murray, Michael Murray, Arthur Barrett, and John Rooney have been indicted in two counts for possession of marijuana in excess of one thousand pounds with intent to distribute and distribution, and conspiracy to distribute, all in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(6), and 846. (Counts I and III).

Defendants James Carter, Joseph Murray, Michael Murray, Stephen King, and Christopher Moscatiello have been indicted in two counts for possession of marijuana in excess of one thousand pounds with intent to distribute and distribution, and conspiracy to possess marijuana in excess of one thousand pounds with intent to distribute, all in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(6), and 846. (Counts II and IV).

Defendants James Carter, Joseph Murray, and Michael Murray have been indicted for possession of marijuana in excess of one thousand pounds with intent to distribute and distribution, in violation of Title 21, United States Code, Sections 841(a)(1) and 941(b)(). (Count V).

The indictments arise out of arrests made on April 6, 1983. All of the defendants allegedly participated in a drug transaction on that date, and were apprehended in the course of that transaction.

All the defendants except Barrett, who has disappeared, have moved to suppress evidence seized in several searches, some with and some without warrant and also have moved to dismiss the indictment because of the illegality of evidence presented to the grand jury.

In summary, the evidence supports a finding that the following events occurred: Meetings and maneuvers by the defendants in the morning alerted surveillance agents of the Drug Enforcement Agency ("DEA") and the Federal Bureau of Investigation ("FBI") that a drug transaction was possibly in the offing. In the afternoon, some of the defendants, presumably Carter and Murray, loaded marijuana into a white Ford truck and a green Dodge camper at a warehouse at 345 D Street in South Boston. The loaded vehicles were driven from the warehouse and turned over to other defendants who were later arrested in or around the vehicles. In the afternoon and evening after the arrests, agents searched the following areas: (1) the white Ford truck (without warrant): (2) the green Dodge camper (with warrant): (3) the warehouse at 345 D Street (first without and later with warrant): and (4) a garage

Sylvester Road, Dorchester, Massachusetts (with warrant). There were other searches conducted, but since they produced no significant material, there is no occasion to enter any orders with regard to them.

I. FINDINGS OF FACT.

A. Information linking the defendants to the drug trade.

The government had information from three informants linking defendants Rooney, Barrett, Joseph and Michael Murray to the drug trade. The first informant, Glen Castro, described from personal knowledge various conversations and transactions involving defendants Rooney and Barrett in early 1983, including (i) Rooney's delivery to Castro of a bale of marijuana; (ii) a conversation with Barrett where Barrett described the counting of $1 million in drug money; (iii) a conversation with Barrett where Barrett indicated he was in charge of a drug operation (at this meeting some $700,000 was in plain view); (iv) generally, the joint involvement of Rooney, Barrett and others in drug traffic. At the time of his interview, Castro was in prison for bank robbery in New Hampshire.

Another informant, one who had provided reliable information to the FBI in the past, had told an agent that Barrettt was selling marijuana and cocaine out of his home in April, 1982. A third informant had described conversations between Barrett and Joseph Murray in March, 1983 about an incoming marijuana shipment, and had averred in a general way that Barrett was part of the "Joe Murray crew," a group known to the FBI as involved in various criminal activities. The third informant connected Barrett to a Ronald Barton, who had been arrested in connection with a purchase of marijuana from an undercover agent in February, 1983. The proposed plan involved the use of a rental truck as a means of transferring marijuana. Although Barton was not convicted, the informant said that he was in fact part of "Mr. Barrett's operation" for marijuana sales.

Sporadic surveillance beginning in July or August of 1982 confirmed the informants' information as to the reg-

ular association of Rooney and Barrett, and as to their occasional association with Barton and with the Murrays. Meetings among Rooney, Barrett, Barton and the Murrays occurred in the vicinity of the Pier Restaurant on Northern Avenue. Independent information received in March, 1983 indicated that there was a warehouse somewhere in South Boston which was used to store marijuana.

B. Surveillance and arrest of defendants.

On April 5, 1983, a surveillance was conducted by Special Agents of the FBI, which resulted in the following observations:

(a) 11:45 a.m.—John Rooney came out of 15 Sylvester Road, Dorchester, Massachusetts, entered a white Ford truck (MA Reg. AD 1994), and proceeded on Gallivan Boulevard to the Southeast Expressway, arriving at the Pier Restaurant, Northern Avenue, Boston, at 11:52 a.m. and stopping briefly in the parking lot.

(b) 11:58 a.m.—Arthur Barrett, driving a white Mercury Brougham (MA Reg. 937599), left the Pier Restaurant Parking lot and proceeded down Northern Avenue toward the Southeast Expressway. Barrett stopped at the side of the road and ducked down in the driver's seat.

(c) 11:59 a.m.—Rooney was observed driving the white Ford truck down Northern Avenue toward the Southeast Expressway.

(d) 12:07 p.m.—The white Ford truck was observed parked at 15 Sylvester Road, Dorchester.

(e) 12:11 p.m.—Arthur Barrett arrived at 15 Sylvester Road, Dorchester, driving his white Mercury Brougham. At 12:15 Barrett left his vehicle on the street, walked toward the garage at 15 Sylvester Road and then returned to his vehicle.

(f) 12:12 p.m.—A black Chevrolet Blazer (MA Reg. AE2117) left the driveway at 15 Sylvester Road and Rooney backed the white Ford truck into the driveway and to the door of the garage.

(g) 12:17 p.m.—Rooney left the residence at 15 Sylvester Road, entered Barrett's vehicle and he and Barrett drove toward Boston on Gallivan Boulevard. (Tr. 2-19 to 2-24).

On April 6, 1983, another surveillance was conducted by Special Agents of the FBI and DEA, which resulted in the following observations:

(a) 11:00 a.m.—The white Ford truck (MA Reg. AD 19994) was observed parked next to the white Mercury Brougham (MA Reg. 9375899) on Northern Avenue with Arthur Barrett and John Rooney sitting in the front seat of the Mercury; at 11:12 a.m., Barrett and Rooney drove in the Mercury to the vicinity of the Pier Restaurant parking lot, turned around and returned to their former parking location. (Tr. 2A-5).

(b) 11:27 a.m.—A blue van (MA Reg. AB 66685) with ladders on the roof parked next to Barrett's vehicle and the driver of the blue van got out and spoke with Barrett. At that point, the white Ford truck backed out onto Northern Avenue and proceeded in the direction of the Southeast Expressway and was followed by surveillance agents. Suddenly, the white Ford truck made a U-turn and passed the surveillance agents who noted the driver to have black hair and be wearing sunglasses. Also, at this time, John Rooney was observed sitting in the passenger seat of Barrett's vehicle but Barrett was not seen. (Tr. 2A-5 to 2A-7).

(c) 11:50 a.m.—The white Ford truck, being driven by a man wearing a dark green shirt and sunglasses, later identified as Michael Murray, returned to the Northern Avenue area heading back to the original parking spot with an unidentified passenger. (Tr. 2A-8 to 2A-9; 3-9 to 3-10). The truck pulled alongside the white Mercury (Barrett's vehicle). (Tr. 2A-9; 3-11).

(d) 12:03 p.m.—The white Ford truck backed out onto Northern Avenue and drove toward the Southeast Expressway closely followed by the white Mer-

cury. At this time, John Rooney was driving the white Ford truck and Arthur Barrett was driving the white Mercury. Surveillance agents followed the vehicles on the Southeast Expressway where Barrett continued to maintain a position directly behind the white Ford van, leaving no room for any vehicle to move in behind the truck. (Tr. 2A-9 to 2A-10; 3-12 to 3-14).

(e) 12:15 p.m.—The white Ford truck and the white Mercury arrived at 15 Sylvester Road. Rooney backed the truck into the driveway and up to the garage located at the end of the driveway. (Tr. 3-15). Objects were placed on either side of the truck, obstructing any view into the garage. (Tr. 8-4 to 8-6).

(f) 12:41—The white Ford truck driven by Rooney and the white Mercury driven by Barrett left 15 Sylvester Road and drove to the southeast Expressway, and on to the area of Santoro's Sub Shop, Northern Avenue. During this drive, Barrett maintained a position about 100 feet behind the white Ford truck. (Tr. 3-16 to 3-17). Upon arrival, the truck parked at Santoro's and the white Mercury proceeded further up the road, made a U-turn and returned, parking next to the white truck. (Tr. 3-17 to 3-18).

(g) 12:50 p.m.—The blue van (MA Reg. AB 66685) was observed parked in a parking lot adjacent to a white cinderblock building at 345 D Street, South Boston, Massachusetts. (Tr. 2A-12 to 2A-13). Also, at this time, other surveillance agents observed Barrett and Rooney enter Santoro's Sub Shop for a short time. Rooney was then observed to go to a nearby pay phone and then join Barrett in the white Mercury. A short time later, Barrett walked to the same pay phone, appeared to make a call and returned to his car, while Rooney paced back and forth in front of Santoro's, apparently observing traffic driving on Northern Avenue. (Tr. 7-55 to 7-56).

(h) 1:10 p.m.--A 1982 GMC Jimmy (MA Reg. 129 KGD, registered to Joseph Murray, 51 Allston Street, Charlestown, Massachusetts) was observed parked

next to the D Street door of the building at 345 D Street, South Boston. (Tr. 3-18 to 3-19).

(i) 1:15 p.m.—The blue van was observed driving on Northern Avenue toward the Southeast Expressway. (Tr. 7-55).

(j) 1:25 p.m.—The blue van returned to Northern Avenue from Atlantic Avenue, pulled into the parking lot of Anthony's Pier Four Restaurant and parked beside a red Jeep Cherokee (MA Reg. 180 GVJ). (Tr. 7-57). Three men were observed meeting and apparently engaging in conversation. These men were later identified as Michael Murray, James Carter, and Stephen King. (Tr. 7-58). After a brief meeting, Carter and Murray returned to the blue van, King returned to the red Cherokee and they proceeded to Santoro's Sub Shop with the blue van in front and the red Cherokee directly behind. (Tr. 7-58).

(k) 1:30 p.m.—Murray, Carter, Barrett, and Rooney met at Santoro's and appeared to be in conversation. Murray then entered the white Ford truck and Carter was lost from sight going behind the white Ford truck. Murray, driving the white Ford truck and Carter driving a green Dodge camper (MA Reg. AD 71871) backed onto Northern Avenue and proceeded to the intersection of D Street and First Street, South Boston. (Tr. 7-59).

(l) 1:45 p.m.—The green Dodge camper was observed to park in the lot at the left of 345 D Street and the white Ford truck stopped on the First Street side of the 345 D Street building, next to two large black overhead doors. (Tr. 6-4 (Powers)). The right hand overhead door was raised by someone apparently inside the building, and the white Ford truck immediately backed into the building followed closely behind by the green Dodge camper. (Tr. 3-20; 6-4 (Powers)). The overhead door was immediately pulled down and closed. (Tr. 6-5 (Powers)).

(m) 2:05 p.m.—The same overhead door was opened and the green Dodge camper and white Ford truck immediately drove out of the building (345 D Street).

(Tr. 3-22; 6-6 (Powers)). Surveillance agents following the two vehicles drove in front of the building and observed a white male pulling a chain to lower and close the overhead door. (Tr. 6-7 (Powers)). Also, at this time, the agents observed inside the building a second individual and a tractor trailer rig with a large dark colored container on top. (Tr. 6-7 (Powers)).

(n) The green Dodge camper was followed from 345 D Street to the parking lot of the Pier Restaurant, Northern Avenue, where it parked facing Northern Avenue. The white Ford truck took the same route but was separated from the green camper by a traffic light (Tr. 6-8 (Powers)), and was observed at 2:10 p.m. to drive past the Pier Restaurant parking lot, where the green Dodge camper followed directly behind the white truck. Both vehicles proceeded to Santoro's on Northern Avenue and parked on the street, one behind the other, to the right of Santoro's. (Tr. 6-9 (Powers)). Murray got out of the white Ford truck and walked toward Santoro's. At the same time, Rooney was observed walking from the area of Santoro's toward Murray. Both men converged, exchanged a set of keys from Murray to Rooney and kept walking without stopping and without any acknowledgment. (Tr. 6-9 (Powers)). Rooney walked directly to the white Ford truck, entered it, started the engine, and drove to the Southeast Expressway, southbound. (Tr. 6-9 (Powers)).

(o) Shortly after 2:10 p.m., the blue van was observed on Northern Avenue, where it came to a stop in the vicinity of a flower vendor at the roadside, (Tr. 3-24), at which time it was approached by Christopher Moscatiello. (Tr. 3-24, 4-18). Moscatiello then crossed Northern Avenue to the green Dodge camper, entered the camper and drove on Northern Avenue to Sleeper Street. (Tr. 6-11 to 6-12 (Powers)). At Sleeper Street, the green Dodge camper stopped without any traffic or traffic signals impeding its progress. After a short time, the red Jeep Cherokee driven by Stephen King, pulled up directly behind the green Dodge camper.

(Tr. 6-11 (Powers)). The green Dodge camper immediately drove on to Massachusetts Turnpike by way of the Southeast Expressway. During the entire ride to the Massachusetts Turnpike, the red Cherokee followed directly behind the green Dodge camper, never allowing enough room for another vehicle to move between the two vehicles. Also during this trip, the green Dodge camper made several lane changes and was followed closely each time by the red Cherokee. (Tr. 6-14 (Powers)).

(p) At 2:25 p.m., the green Dodge camper and the red Cherokee were stopped by surveillance agents while in a toll line at the Allston Toll Plaza. Christopher Moscatiello was removed from the green Dodge camper and Stephen King from the red Cherokee and each was placed under arrest. (Tr. 6-15 (Powers)). Special Agent Powers (DEA) entered the green Dodge camper to move it out of the toll plaza line and off to the roadside. (Tr. 6-15 (Powers)). Agent Powers then looked to the rear of the cab and saw, through an angular opening in the curtains to the rear window of the camper area of the vehicle, burlap bales, which he knew to be a common packing for marijuana. (Tr. 6-16 (Powers)). These facts were broadcast to all other agents. (Tr. 6-27 (Powers)).

(q) After the two vehicles were moved to the side of the road, Moscatiello and King were placed under arrest, informed of their rights and transported to the DEA Boston office. (Tr. 6-36 (Powers)). The two vehicles were seized and removed to the J. F. Kennedy Federal Building, Boston.

(r) At 2:30 p.m., John Rooney, who had been followed from the Northern Avenue area, arrived at 15 Sylvester Road, Dorchester, and backed the white Ford truck into the driveway. As Rooney got out of the vehicle he was placed under arrest. One of the agents on the scene indicated he observed an odor of marijuana coming from the truck. Another agent removed a set of keys from Rooney's hands at the time of his arrest and Special Agent Boeri (DEA) used one

of the keys to unlock the rear door of the truck. Upon opening the door, the agent observed approximately 60 bales of marijuana. (Tr. 8-15 to 8-17). The garage was then secured by the stationing of agents outside it, (Tr. 8-21) and Agent Boeri advised the other agents involved in the surveillance of the facts he had learned by radio. (Tr. 8-20). At this time, the location of Arthur Barrett was unknown.

(s) At approximately 2:20 p.m., other agents drove into the parking lot of the Pier Restaurant and observed two males seated in separate vehicles adjacent to one another. (Tr. 2A-20, 4-33). The man seated in a green pickup truck, later identified as Craig Billingham, ducked down in the driver's seat. The agents approached and observed the man whom they identified as Michael Upton in a gray Mercury Zephyr. (Tr. 2A-20, 4-33). At this time, the blue van drove slowly by the Pier Restaurant parking lot. (Tr. 2A-21). The agents stopped the blue van and subsequently identified James Carter and Michael Murray as the passenger and driver of the van. (Tr. 2A-22, 3-25). Carter and Murray were placed under arrest when the agents received the information by radio from agents at Sylvester Road, Dorchester, and at the Allston Toll Plaza, Massachusetts Turnpike that the green camper, red Cherokee and white truck had been stopped and the occupants arrested. (Tr. 2A-23, 4-36 to 4-37, 6-11 (Garibotto)).

(t) At approximately 2:30 p.m., agents had moved to the area of the white cinderblock building at 345 D Street, South Boston, where they observed a short white male, approximately 45 years old, with swept black hair, gloves in his rear pants pocket and smoking a pipe. (Tr. 3-28). This man was pacing back and forth on D Street in front of the white cinderblock building, looking at traffic as it passed. (Tr. 3-29). The agents drove around the block and the man was no longer seen outside the building. (Tr. 3-30, 6-11 to 6-12 (Garibotto)).

(u) At approximately 2:40 p.m., other agents arrived on the scene and attempts were made to determine if anyone was in the building at 345 D Street, by knocking and then banging on the entry door and on the large, overhead doors. Agents went around the building through a window but there was no exterior position affording a view of the general interior of the building. (Tr. 3-31). At all stages of this process, the agents were regularly stating their identities as federal law enforcement agents. (Tr. 3-31). Finally, in an effort to apprehend any participants who might have remained inside and to guard against the destruction of possibly critical evidence, the agents made a forced entry of the building. (Tr. 3-32). After a brief view of the premises, they determined that no one was inside (Tr. 3-33), detected both a strong order of marijuana and observed many burlap wrapped bales which they believed to contain marijuana. The building was then secured and guarded from the outside (Tr. 3-34, 6-13 to 6-17 (Garibotto)).

(v) At approximately 3:00 p.m., Arthur Barrett arrived at 15 Sylvester Road, Dorchester, and was immediately placed under arrest. (Tr. 8-21). His white Mercury was seized and he and Rooney were transported to DEA Boston office.

The FBI and DEA agents involved in the case testified that the vehicle exchanges are a common mode of transferring large purchases of marijuana and that the pattern of vehicular movement described above was indicative to them, as experienced law enforcement officers, of an imminent illicit sale of a large quantity of marijuana. The decision to arrest the defendants and to conduct the above searches and seizure was made jointly by supervising agents of the FBI and the DEA.

The times stated are very approximate, and the defendants strongly contest the times stated in items (s) and (u). They offered evidence that these events occurred earlier than stated, and that the seizer of the white Ford truck, green Dodge camper and the red Cherokee came

after the warrantless entry by the agents into the D Street warehouse and the observation by the agents of quantities of marijuana therein. The defendants' witnesses attempted to fix time by estimating time elapsed between various events. This form of estimating time is notoriously inexact. It is common experience that one's perception of the lapse of time is subject to a number of subjective variables. The agents' concept of time is probably not a great deal better in terms of minutes. I do accept their account of the sequence of events as being more probable than otherwise. *United States v. Matlock,* 415 U.S. 164, 177 (1974); *United States v. Ochs,* 461 F.Supp. 1, 7 (S.D. N.Y.), *aff'd,* 636 F.2d 1205, *cert. den.,* 451 U.S. 1016 (1981).

C. Searches and seizures.

The agents who arrested Rooney at 15 Sylvester Road also searched the white Ford truck, found bales of marijuana in the truck and seized both the truck and the bales of marijuana. The agents who arrested Moscatiello seized the green Dodge camper. Thereafter the agents secured search warrants for the green camper, the D Street warehouse and the garage at 15 Sylvester Road. The resulting search revealed a substantial number of bales of marijuana in the back of the camper, in the warehouse and in the garage.

In their application to the magistrate for the search warrant for the D Street warehouse, the agents did not reveal the fact that they had previously made the forced entry into the warehouse.

II. RULINGS OF LAW.

Critical to the resolution of the motions to suppress is a determination of whether the pattern of vehicular movements on April 5, 1983 and again on April 6, 1983 (paragraphs (a) to (o) above) constituted probable cause for the subsequent arrests and seizures, and by extension for the issuance of search warrants. This pattern must be considered in the light of the agents' information that Barrett, Rooney and the Murrays were engaged in the drug traffic.

In *Illinois v. Gates,* 103 S. Ct. 2317 (1983), the Supreme Court discussed the standard for determining the existence of probable cause:

> [W]e deal with . . . the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. . . . The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.

Evidence which would have little significance to a layman may provide a meaningful pattern to experienced law enforcement officials. *United States v. Cortez,* 449 U.S. 411, 418 (1981); *United States v. Manchester,* ___ F.2d ___ (1st Cir. July 7, 1983) (No. 82-1371 slip opinion).

If there was probable cause to believe that the pattern of the defendants' activity revealed an ongoing drug transaction, the search of the white panel truck was reasonable. *United States v. Ross,* 456 U.S. 798 (1982). Even though the truck had temporarily come to rest, the exigency was the same as it is in cases where a vehicle has been stopped on the highway.

If the pattern of activity, taken together with the informant's information, constituted probable cause for the arrest of the defendants, it is clear that the recitation of these events was a sufficient basis for the issuance of the various search warrants. The one further question concerning the search warrants is whether the warrant for the D Street warehouse was vitiated by the prior warrantless entry of the warehouse. If the entry of the warehouse had been illegal, any recitation of the observations made by the agents in the application for a search warrant would have rendered the search warrant invalid as fruit

of an illegal search. That was not the case, however, and there was no such taint.

The defendants assert, however, that the *failure* to reveal the prior entry itself tainted the issuance of the search warrant. Deliberate misstatements by agents in the application for a search warrant vitiate the warrant. *Franks v. Delaware,* 438 U.S. 154 (1978); *United States v. Belculfine,* 508 F.2d 58 (1974). However, the courts have uniformly held that an *omission* of facts from an affidavit, without more, does not constitute a false statement made with intent to deceive within the meaning of *Franks v. Delaware. See United States v. Stini,* 658 F.2d 593, 597 (8th Cir. 1981); *United States v. Lewis,* 621 F.2d 1382, 1389 (5th Cir.) *cert. denied* 450 U.S. 935 (1981); *United States v. Botero,* 589 F.2d 430, 433 (9th Cir.) *cert. denied* 441 U.S. 944 (1979). The omission of information regarding the earlier entry into the warehouse from the warrant affidavit was not a false statement, and it did nothing to "enhance the contents of the affidavit," *United States v. Stini,* 658 F.2d at 597, or to deceive the magistrate into granting the warrant. *United States v. Lewis,* 621 F.2d 1382 (5th Cir. 198) is directly on point. There, DEA agents had made a warrantless search of a laboratory, and omitted mention of it in the warrant affidavit. The defendants argued that the agent's failure to inform the magistrate of the prior search was an intentional and material misrepresentation regarding invalidation of the warrant. The magistrate disagreed, and the Court of Appeals affirmed.

The defendants also suggest that because the affidavit misidentifies the source of the information that there was a marijuana warehouse in South Boston, the warrants are invalid. Although the agents were confused about the source of the tip, they had, in fact, received the tip. The error in attribution was insignificant.

Nighttime searches for controlled substances are authorized by statute. 21 U.S.C. §879. *Gooding v. United States,* 416 U.S. 430, 458 (1974).

CONCLUSIONS.

The critical question in this case is whether the pattern of activity observed by FBI and DEA agents on April 5 and 6, 1983 furnished probable cause for the arrest of the defendants, the seizure and search of the vehicles and the eventual searches under warrants. Reliance on the expertise of the law enforcement officers introduces a subjective element into the assessment of probable cause which on a sliding scale degenerates to mere hunch or guesswork. What is more, there is no opportunity to test the officers' track record, as one can test, for instance, the performance of a drug-sniffing police dog. In all the cases which come to the attention of the courts, the police have been correct. We do not know how many warrantless searches have been fruitlessly inflicted on the innocent.

In this case, the pattern of activity by itself, even though consistent with the mode of operation of drug dealers, would not of itself justify the officers' actions. Similarly, the information gathered from informers concerning the defendants' prior drug related activities, standing alone, were not sufficiently specific as to present activity to justify arrest, seizure or search. The informers' information, however, illuminates the unusual but otherwise inexplicable activity of the defendants of April 5 and 6. On balance, I am persuaded that the officers were justified in arresting the defendants searching the white Ford truck and seizing the green Dodge camper. One of the significant facts was the collective nature of the decision of arrest, seizure and search. I find it was the collective and considered judgment of experienced supervisors of both FBI and the DEA that there was a drug transaction in the process of consummation. The Fourth Amendment does not impose on law enforcement a foolish paralysis.

It follows that the same facts, with the addition of the results of the search of the white Ford truck and the observation of marijuana in the green Dodge camper, furnished probable cause for the issuance of search warrants.

The affidavit in support of the various applications did contain an averment that the agent who stopped the green Dodge camper smelled marijuana coming from the cab of the vehicle. As a result of taking a view of the camper I concluded that it was improbable that any odor smelled in the cab came from the camper section of the truck where the marijuana was found since the camper was a separate fully enclosed unit. I have not found and do not find, however, that the agent was making a deliberate material misstatement sufficient to invalidate the search warrant in accordance with *United States v. Belculfine*, 508 F.2d 58 (1st Cir. 1974). In *Belculfine*, the agents' reported observation was physically impossible. In this case, it was not impossible that the odor of marijuana came from some source within the cab.[1] That particular information was not crucial, however, since the agent also observed a bale which looked like a bale of marijuana.

Accordingly, I find and rule that none of the above arrests, searches or seizures violated the Fourth Amendment. There were searches at other locations but since no evidence was found or seized at those locations, there is no point in discussing them in this memorandum.

SUPPLEMENTARY FINDINGS AND RULING ON STANDING.

The foregoing makes moot the issue of standing to complain of the various searches and seizures. To complete the record I make the following findings and ruling:

1. Rooney had a sufficiently authorized possessory interest in the white Ford truck to give him standing to complain of the search thereof. He has no standing with respect to any other search and seizure. No other defendant has standing with reference thereto.

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[1]At the view I was shown a purported bale of marijuana which had no distinguishable odor at all. A subsequent view in another case had led me to believe that fresh or damp marijuana does have a distinctive, pungent and clinging odor.

2. Moscatiello had a sufficiently authorized possessory interest in the green Dodge camper to have standing to complain of the search thereof. He has no standing with respect to any other search. No other defendant has standing with reference thereto.
3. None of the defendants have standing to challenge the search of the warehouse, which was owned by a corporation in the absence of any evidence that any portion of the warehouse was set aside for the personal use of any defendant as corporate officer, employee or financial backer.
4. No defendant has standing to complain of the search of the garage at 15 Sylvester Road, since the owner of the house had obvious access to it, and there was accordingly no legitimate expectation of privacy.

ORDER

The various motions to suppress are DENIED. The motions to dismiss because of the presentation of illegal evidence to the grand jury are DENIED for the same reasons.

WALTER J. SKINNER

United States District Judge

APPENDIX C

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 84-1263

UNITED STATES,

Appellee,

v.

MICHAEL F. MURRAY,

Defendant, *Appellant.*

JUDGMENT

Entered August 26, 1985

This cause came on to be heard on appeal from the United States District Court for the District of MASSACHUSETTS, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

/s/ _____

Francis P. Scigliano
Clerk.

APPENDIX D

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 84-1192

UNITED STATES OF AMERICA,

Appellee,

v.

CHRISTOPHER MOSCATIELLO,

Defendant, *Appellant.*

No. 84-1193

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN M. ROONEY,

Defendant, *Appellant.*

No. 84-1262

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES D. CARTER,

Defendant, *Appellant.*

No. 84-1263

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL F. MURRAY,

Defendant, *Appellant.*

Before

Campbell, *Chief Judge,*
Breyer, *Circuit Judge,*
and Weigel,* *Senior District Judge.*

ON PETITION FOR REHEARING

Entered October 31, 1985

For purposes of clarification, we amend our opinion issued August 26, 1985 as follows:

On page 11, first full paragraph, line 1, after "that", insert the words "at least part of".

On page 11, first full paragraph, line 3, after "§ 3161(h)(1)(F)," add: ", in respect to those particular motions."

On page 11, first full paragraph, last line, add: "This is not to say, of course, that more than 30 days can be

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*Of the Northern District of California, sitting by designation.

excluded under Section 3161(h)(1)(J) for deciding the suppression motions. Rather, we simply hold that the additional five days which must be excluded to avoid a violation of the Act are excludable under section 3161(h)(1)(F) as constituting time reasonably attributable to the remaining nonsuppression motions."

On page 12, first paragraph, line 2, "amounted to 45 days" should be chaged to read "did not exceed 70 days."

The petition for rehearing is in all other respects denied.

By the Court,

/s/ _____
Francis P. Scigliano
Clerk

APPENDIX E

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 84-1192

UNITED STATES OF AMERICA,

Appellee,

v.

CHRISTOPHER MOSCATIELLO,

Defendant, Appellant.

No. 84-1193

UNITED STATES OF AMERICA,

Appellee,

v.

JOHN M. ROONEY,

Defendant, Appellant,

No. 84-1262

UNITED STATES OF AMERICA,

Appellee,

v.

JAMES D. CARTER,

Defendant, Appellant.

No. 84-1263

UNITED STATES OF AMERICA,

Appellee,

v.

MICHAEL F. MURRAY,

Defendant, Appellant,

Before: CAMPBELL, *Chief Judge,* BREYER, *Circuit Judge,* and WEIGEL,* *Senior District Judge.*

ON PETITION FOR REHEARING
Entered October 31, 1985

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By the Court,
Francis P. Scigliano
Clerk.

*Of the Northern District of California, sitting by designation.

Supreme Court, U.S.
FILED
APR 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

Nos. 85-1105, 85-1118 and 85-1120

In the Supreme Court of the United States

OCTOBER TERM, 1985

JAMES D. CARTER AND CHRISTOPHER MOSCATIELLO, PETITIONERS

v.

UNITED STATES OF AMERICA

MICHAEL F. MURRAY, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN M. ROONEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
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QUESTIONS PRESENTED

1. Whether a search warrant must be obtained in order to conduct a search of a motor vehicle stopped in the driveway of a private residence (No. 85-1120).

2. Whether evidence observed during a warrantless entry into building should be suppressed if it would inevitably have been discovered during the subsequent search of the building pursuant to a valid search warrant (Nos. 85-1105, 85-1118).

3. Whether the court of appeals correctly computed the time excludable under 18 U.S.C. 3161(h)(1)(F) for disposition of pretrial motions in determining whether the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*, was violated.

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21 U.S.C. 841 2
21 U.S.C. 846 2

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1105

JAMES D. CARTER AND CHRISTOPHER MOSCATIELLO, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 85-1118

MICHAEL F. MURRAY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 85-1120

JOHN M. ROONEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A30)[1] is reported at 771 F.2d 589. The orders of the district court (Pet. App. A31-A50) are unreported.

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[1] "Pet. App." refers to the appendix to the petition in No. 85-1105.

JURISDICTION

The judgment of the court of appeals (Pet. App. A51) was entered on August 26, 1985. Petitions for rehearing were denied on October 31, 1985 (Pet. App. A52-A53). The petition for a writ of certiorari in No. 85-1105 was filed on December 26, 1985. The petitions for a writ of certiorari in Nos. 85-1118 and 85-1120 were filed on December 30, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioners Carter and Murray were convicted on one count of conspiracy to possess a quantity of marijuana in excess of 1000 pounds with intent to distribute, in violation of 21 U.S.C. 841 and 846. Each was sentenced to four years' imprisonment and fined $15,000. Petitioners Rooney and Moscatiello each entered conditional guilty pleas to one count of possession of a quantity of marijuana in excess of 1000 pounds with intent to distribute, in violation of 21 U.S.C. 841. Rooney was sentenced to 15 months' imprisonment, to be followed by a two-year special parole term, and fined $15,000. Moscatiello was sentenced to 18 months' imprisonment, to be followed by a two-year special parole term, and fined $15,000.[2] The court of appeals affirmed (Pet. App. A1-A30).

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[2] The trial court dismissed two counts against petitioners Carter and Murray at the close of the government's case, and the jury acquitted Carter on two other counts. The court also dismissed one count against co-defendant Steven David King and the jury returned a verdict of not guilty as to the remaining count on which he was charged. The court granted co-defendant Joseph Murray's motion for a judgment of acquittal. Co-defendant Arthur Michael Barrett became a fugitive before trial.

1. The evidence developed at a suppression hearing and at trial is summarized in the opinion of the court below (Pet. App. A2, A9-A11, A13-A16). FBI investigators learned from informants that, between early 1982 and March 1983, petitioner Rooney, Arthur Barrett, and others were involved in a large-scale marijuana importation and distribution network operating out of a garage in South Boston. Consequently, in July 1982 the agents commenced surveillance of the suspects' activities, verified their regular association, and learned from other informants that they maintained a warehouse somewhere in South Boston in which they stored marijuana.

On April 5 and 6, 1983, the agents observed petitioners and others engage in a pattern of activity that included clandestine efforts to load, transport, and deliver material in a white Ford truck, a green camper and a blue van (Pet. App. A15-A16). During the early afternoon of April 6, the agents stopped the green camper, which was being driven by petitioner Moscatiello, along with a red jeep that was accompanying it, on the Massachusetts Turnpike and arrested the two drivers. Upon entering the cab of the camper to move it to the roadside, one of the agents observed burlap-covered bales inside the camper. Upon examination pursuant to a search warrant, the bales proved to contain marijuana. Other agents followed the white Ford pickup truck driven by petitioner Rooney from the time it left a warehouse until it stopped in a driveway at a private residence. As Rooney left the vehicle, he was placed under arrest. One of the arresting officers smelled the odor of marijuana emanating from the vehicle and used a key taken from Rooney to open its door. Inside, he observed approximately 60 bales of marijuana. At approximately the same time, other agents stopped the blue van and arrested petitioners Carter and Murray. *Id.* at A9-A10.

The agents then converged on the warehouse where the vans apparently had been loaded. There, they observed a man pacing back and forth in front of the building ob-

serving traffic as it passed. After the agents drove around the block, however, the man disappeared. Shortly thereafter, other agents arrived on the scene, and attempts were made to determine whether anyone was inside the building by banging on its door and announcing the presence of law enforcement officers. When these efforts proved unsuccessful, the agents made a warrantless forced entry of the building "in an effort to apprehend any participants who might have remained inside and to guard against the destruction of possibly critical evidence" (Pet. App. A41). The agents made a brief walkthrough of the premises, determined that no one was inside, and then departed and guarded the building from the outside. In the course of walking through the building, the agents detected a strong odor of marijuana and observed many burlap-wrapped bales, which they suspected contained marijuana. *Id.* at A10-A11, A40-A41.

Following their departure, the agents obtained a warrant to search the building. In their application for the warrant, the agents did not mention the warrantless entry and did not make use of any information they had obtained as a result of that entry. Execution of the warrant resulted in the seizure of approximately 500 bales of marijuana, which were each marked with tapes bearing numbers, as well as notebooks listing the customers whose names corresponded with the numbers on the bales. Pet. App. A11, A28.

2. Prior to trial, petitioners moved to suppress the evidence discovered as a result of these searches and seizures. They alleged, inter alia, that the police lacked probable cause to stop their vehicles; that the warrantless search of the white truck was unreasonable; and that the warrantless entry into the warehouse, during which the marijuana bales were seen, was unlawful and vitiated the subsequent seizure of the bales pursuant to the search warrant. The district court denied the motions (Pet. App. A31-A47).

The court of appeals affirmed (Pet. App. A1-A30). The court held that the information furnished by the informants, coupled with the agents' own observations, provided sufficient probable cause to justify stopping the vehicles. It held that a warrant was not required to search the white truck that petitioner Rooney had been driving prior to his arrest simply because it was parked in a private driveway at the time the search was conducted. *Id.* at A11-A20. The court found that the warehouse search warrant was not invalidated by the fact that the application failed to mention the earlier warrantless entry of the building (*id.* at A26). The court also rejected petitioners' argument that the marijuana bales observed during that entry must be suppressed. The court found it unnecessary to resolve whether the warrantless entry was justified by exigent circumstances, namely, in order to avert the possibility that evidence would be destroyed by persons who may have been inside, noting that the failure of the district court to make findings on the question of exigency made it difficult to address the issue (*id.* at A23). Assuming arguendo that the warrantless entry was unlawful, the court reasoned that, because the bales of marijuana were in plain view, they would inevitably have been discovered as the result of the subsequent lawful warrant search. Under the principles of *Segura* v. *United States*, No. 82-5298 (July 5, 1984), and *Nix* v. *Williams*, No. 82-1651 (June 11, 1984), the court concluded therefore that there was not a sufficient nexus between the assumed illegality and the evidence in question to justify suppression (Pet. App. A27-A28).

3. a. Petitioners and the other co-defendants were indicted on April 20, 1983. On May 9, 1983, they filed various pretrial motions. Some of the motions sought suppression of the evidence seized; others sought other forms of relief such as severance, election of counts, and specification of the order of the government's proof. On October 17, 1983, the district court completed hearings on

the motions to suppress and took them under advisement. The motions for severance and other forms of relief were denied on December 21, 1983; the motions to suppress were denied on December 23, 1983. Trial began one month later, on January 23, 1984, some 278 days after the return of the indictment. Pet. App. A5, A63-A64.

On the day the trial began, petitioners and the other co-defendants moved to dismiss the indictment on the ground that the Speedy Trial Act, 18 U.S.C. 3161 *et seq.*, had been violated. In connection with the motion, they conceded that 195 days were excludable under the Act; in its subsequent order, the district court noted that an additional eight days were excludable because of the pendency of a government motion to use charts at trial—a finding that is not challenged by petitioners. These exclusions yielded an uncontested total amount of excludable time of 203 days, which left only five days in excess of the 70-day maximum prescribed by the Act. Pet. App. A48-A49.

b. The district court denied the motion to dismiss (Pet. App. A48-A50). The court noted that under Section 3161(h)(l)(J) of the Act only 30 days of the period between the October 17, 1983, suppression hearing and the December 23 ruling could be excluded as attributable to consideration of the suppression motions. The court explained, however, that the other pending motions, some of which concerned the ordering of the presentation of the government's evidence, would have been mooted if a suppression order had been entered; hence, those motions were not taken under advisement until the suppression motions were resolved. Those motions, the court reasoned, were not subject to the 30-day limit of Section 3161(h)(l)(J) for consideration of motions, but were covered by the provisions of Section 3161(h)(l)(F), which excludes "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion."

Under the latter provision, the trial court concluded that, even though the motion to suppress was under advisement for more than the 30-day period excludable under Section 3161(h)(l)(J), the additional period was not an unreasonable time "given the complexity of the testimony and the difficulty of determining the extent to which subjective judgment * * * should support a finding of probable cause." Because the rulings on the suppression motions could have been dispositive of the nonsuppression motions, the court stated that "it was reasonable to hold [those latter] motions until I had decided the motion to suppress" (*id.* at A49). Consequently, the court held that the full period between the filing of the motions and their disposition, representing 35 additional days not conceded by the defendants, was properly excludable (*id.* at A50).

c. The court of appeals affirmed this ruling also (Pet. App. A5-A9). In its initial opinion, the court rejected petitioners' contention (not renewed in this Court) that the 30-day period between October 17, 1983, and November 16, 1983, could not be excluded under Section 3161(h)(l)(J) without a showing that the court was actually considering the motions on each one of those days. Then, addressing the period "through December 23, 1983, during which the * * * [nonsuppression] motions were pending," the court held that the time was excludable under Section 3161(h)(l)(F) because it was reasonable for the district court to have withheld decision on those motions until it could decide the suppression motions. Accordingly, the court of appeals concluded that the total nonexcludable time amounted to only 45 days and that the Speedy Trial Act therefore was not violated.

d. Petitioners sought rehearing, noting that according to the docket sheet and the district court's own statements, the nonsuppression motions were decided on December 21, 1983, rather than on December 23, 1983, as both the district court and the court of appeals apparently had

assumed. See Pet. App. A63-A64. Accordingly, they argued that it could not have been necessary for the district court to dispose of the suppression motions before ruling on the others. Therefore, petitioners argued, no portion of the period after the suppression hearing should have been excludable under Section 3161(h)(l)(F). The court of appeals amended its opinion "for clarification," but otherwise denied the rehearing petition without opinion (Pet. App. A83-A84). The amended opinion noted that the court was not holding "that more than 30 days can be excluded under section 3161(h)(l)(J) for deciding the suppression motions" or that the entire period subsequent to the suppression hearing was excludable. The amended opinion also omitted the conclusion (Pet. App. A9) that the total nonexcludable time amounted to 45 days and substituted the conclusion that "the total nonexcludable time did not exceed 70 days and that the Speedy Trial Act was not violated." *Ibid.*[3]

ARGUMENT

1. Petitioner Rooney contends (85-1120 Pet. 12-17) that the warrantless search of his white Ford truck was unlawful because it was effected without a warrant. Specifically, he maintains that because the vehicle was locked and parked in a private driveway, and because he was in police custody at the time of the search, there were no exigent circumstances to justify proceeding without a warrant. This contention is without merit because it rests on a misperception concerning the conceptual basis for permitting warrantless vehicle searches.

As this Court recently explained in *California* v. *Carney*, No. 83-859 (May 13, 1985), slip op. 4-6:

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[3] The portion of the court of appeals' opinion that addresses the Speedy Trial Act question appears in its amended form at Pet. App. A87-A88.

> The mobility of automobiles, we have observed, "creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible." *South Dakota* v. *Opperman,* [428 U.S. 364, 367 (1976)].
>
> However, although ready mobility alone was perhaps the original justification for the vehicle exception, our later cases have made clear that ready mobility is not the only basis for the exception. The reasons for the exception, we have said, are twofold. 428 U.S., at 367. "Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." *Ibid.*
>
> Even in cases where an automobile was not immediately mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle justified application of the vehicular exception. See, *e.g., Cady* v. *Dombrowski,* [413 U.S. 433 (1973)].
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> * * * * *
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> * * * In short, the pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility justify searches without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause is met.

See also *Florida* v. *Meyers,* 466 U.S. 380 (1984) (authorizing warrantless search of impounded car); *Michigan* v. *Thomas,* 458 U.S. 259, 261 (1982) ("the justification to conduct * * * a warrantless search does not vanish once the car has been immobilized"); *United States* v. *Chadwick,* 433 U.S. 1, 12 (1977) (noting that the Court has sustained warrantless searches of vehicles in cases in which "the possibilities of the vehicle's being removed or

evidence in it destroyed were remote, if not nonexistent" because of "the diminished expectation of privacy which surrounds the automobile"); *Cardwell* v. *Lewis*, 417 U.S. 583, 590 (1974) (plurality opinion). Accordingly, because one's diminished expectation of privacy in a motor vehicle alone justifies a warrantless search of its interior on the basis of probable cause, it is inconsequential whether, at the time of the search, exigent circumstances independently would justify failure to obtain a warrant.

Petitioner's reliance (Pet. 16-17) on *Coolidge* v. *New Hampshire*, 403 U.S. 443, 458-463 (1971), is unavailing. First, the portion of the *Coolidge* opinion on which petitioner relies was joined by only four Justices and therefore lacks precedential effect. As discussed above, the plurality's suggestion there that an automobile search must be conducted with a warrant in the absence of exigent circumstances has been rejected by subsequent decisions. Moreover, as the court below observed (Pet. App. A19), this case is plainly distinguishable from *Coolidge*. Here, the agents searched petitioner Rooney's truck contemporaneously with his arrest. And, although his truck came to rest in a private driveway, the driveway was not his own, and the vehicle had been pursued to that location by the police, rather than resting there for some time as in *Coolidge*. It is difficult to see what significance should attach to the fact that petitioner Rooney drove into a private driveway before being stopped. It was not his driveway, and therefore he had no right to exclude the police from entering the driveway. And there is no reason why the expectation of privacy in the truck itself should be enhanced by its location in the driveway.

2. a. Petitioners Murray, Carter, and Moscatiello contend (85-1118 Pet. 8-19) that the court of appeals erred in holding that the marijuana bales seen during the brief, warrantless entry into the warehouse could be admitted at trial because they would inevitably have been discovered

during the course of the lawful warrant search. Petitioners do not dispute the admissibility of the other evidence seized during the warrant search and do not dispute that the marijuana bales in question would also have been admissible if they had not previously been seen by the officers in plain view. That much is clear from this Court's decision in *Segura* v. *United States,* No. 82-5298 (July 5, 1984).[4] Petitioners argue, however, that because the marijuana bales here were first discovered during the warrantless entry, they are a fruit of that assumed illegality.[5] That argument might well be correct if this Court had rejected the "inevitable discovery" doctrine in *Nix* v. *Williams,* No. 82-1651 (June 11, 1984). The Court, however, recognized the validity of that doctrine and set forth a rationale for the doctrine that is fully applicable to this case. As the Court in *Nix* explained, the inevitable discovery doctrine is akin to the harmless error rule, in that it ensures that evidence will not be suppressed because of police misconduct, if the evidence would have been obtained even absent that misconduct. Therefore, the Court held that if the prosecution can establish by a preponderance of the evidence "that the information ultimately or inevitably would have been discovered by lawful means

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[4] Indeed, because this case involves only a brief protective sweep of the warehouse, rather than the continuing unlawful occupation of the premises for 19 hours that occurred in *Segura,* it appears that even the dissenters in *Segura* might have agreed that this evidence would be admissible; the dissent placed considerable weight on this unlawful continuing seizure. See slip op. 4-12, 16-22 (Stevens, J., dissenting).

[5] We note that petitioners' entire submission rests on the assumption that the warrantless entry was unlawful because it was not justified by exigent circumstances—an issue that the court of appeals expressly declined to decide in the absence of relevant factual findings by the district court (see Pet. App. A23). The fact that this potentially dispositive issue remains unresolved and would have to be explored on remand in the event the Court were to reverse here provides an additional reason why certiorari is not appropriate in this case.

* * * then the deterrence rationale has so little basis that the evidence should be received" (*Nix*, slip op. 11). To suppress evidence in that setting, the Court stated, "would place courts in the position of withholding from juries relevant and undoubted truth that would have been available to police absent any unlawful police activity" (*id.* at 12).

In this case, whether or not the officers saw the marijuana bales during the course of their warrantless protective sweep, they clearly would have discovered those bales, as they did the other evidence, when they conducted the subsequent full search authorized by a valid warrant. Moreover, the observation of the bales during the agents' initial entry contributed nothing to the agents' decision to search the warehouse or to the legal basis asserted for the search. Thus, nothing in the principles set forth by this Court in *Nix* requires the suppression of this probative evidence, which was seized in the course of a lawful search, solely because the bales had been observed during a previous entry.

The thrust of petitioners' submission appears to be that the bales in question constituted "primary evidence" that was tainted by the illegal warrantless entry (see Pet. 9, 16-18). Thus, petitioners suggest that the decision below is inconsistent with *Segura* itself because the Court there noted that "[e]vidence obtained as a direct result of an unconstitutional search or seizure is plainly subject to exclusion" (slip op. 8). But this statement in *Segura* is quite unexceptionable in its context and has nothing to do with the question presented here. First, the evidence in question here was not *obtained* as a result of an unconstitutional search; as *Segura* makes clear, it was obtained by means of a valid warrant search. The question is whether it is significant that the evidence had been *observed* earlier during an unlawful entry. Moreover, the "inevitable discovery" doctrine presupposes that the evidence in question may be "subject to exclusion" because it is " '*in some sense* the product of illegal governmental activity' " (*Nix*, slip op. 11, quoting *United States* v. *Crews*, 445 U.S. 463, 471

(1980) (emphasis in *Nix*)); the doctrine establishes that such evidence should not be excluded if it would inevitably have been discovered through lawful means. Hence, for petitioners to assert that the marijuana is subject to exclusion under long-established Fourth Amendment principles because it was initially discovered in the course of an illegal search (see Pet. 17-18) is simply to pose the question presented in this case—whether the bales are nonetheless admissible under the inevitable discovery doctrine—not to answer it.[6]

To the extent petitioners address the application of the inevitable discovery doctrine, they mischaracterize it as approving a " 'search-illegally-first-obtain-a-warrant-later' procedure" (Pet. 10 n.9; see also Pet. 18). The court of appeals did not suggest that police who make a warrantless search on the basis of probable cause can validate the discovery of evidence by an after-the-fact application for a warrant. The inevitable discovery doctrine is designed to avoid placing the police "in * * * a *worse[]* position" (*Nix*, slip op. 10 (emphasis in original)) than if no illegality had occurred, and it applies only in cases where "the police

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[6] The fact that petitioners' argument on the merits is misdirected is highlighted by their reference to the government's brief in *Segura* (Pet. 9 n.8). As petitioners note, the government stated that "evidence discovered in the course of an illegal search ordinarily should be excluded." Brief for the United States in *Segura* v. *United States*, No. 82-5298 (Oct. Term 1983), at 13. But that general statement is subject to qualification, *inter alia*, by the inevitable discovery doctrine. The government explicitly stated in its brief (at 36 n.21) that, if the Court were to adopt the inevitable discovery doctrine in *Nix*, it would be incorrect to suppress evidence seen during a warrantless security check that would inevitably have been discovered anyway during the later execution of a search warrant. And this issue was specifically reserved by the Court in *Segura* (slip op. 6 n.4). Thus, petitioners' assertion that its position is supported by the government's brief in *Segura*, like its assertion that it is supported by the Court's opinion there, is faulty because it simply ignores the inevitable discovery doctrine, which is at the heart of the question presented here.

would have obtained [the] evidence if no misconduct had taken place" (*id.* at 11). As this Court noted in *Nix* (slip op. 12-13), if the discovery of evidence by lawful means is truly "inevitable," so that the doctrine should apply, the police have little to gain by seeking to discover it by unlawful means. Thus, petitioners' hypothetical "search-illegally-first-obtain-a-warrant-later" procedure would not satisfy the prerequisites for application of the inevitable discovery doctrine.

This case, however, fully satisfies those prerequisites. The police did not enter the warehouse to search for evidence. They made a brief sweep through the warehouse to secure the premises and then departed to await the arrival of a search warrant. Regardless of whether the officers had made the warrantless entry or observed the marijuana, they would inevitably have obtained the warrant and discovered the bales in the course of a lawful search. The fact that they observed some marijuana in plain view in the course of the security sweep is an irrelevant happenstance; it makes no sense as a matter of exclusionary rule policy to suppress that evidence, especially since those items of evidence not observed during the protective sweep are plainly admissible.[7]

b. Petitioners' contention (Pet. 8, 10-16) that the decision below conflicts with numerous decisions of other courts of appeals and state courts is wrong because those decisions for the most part were rendered prior to this Court's decisions in *Segura* and *Nix*, and there is no reason to suppose that those decisions would be treated as good

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[7] We note that the dissenters in *Segura* recognized that it would make little sense to distinguish in this context between evidence that happened to be observed in plain view during an unlawful protective sweep and evidence not observed until later (slip op. 15, footnote omitted (Stevens, J., dissenting)): "If the execution of a valid warrant takes the poison out of the hidden fruit, I should think that it would also remove the taint from the fruit in plain view."

law today. For example, *United States* v. *Griffin*, 502 F.2d 959 (6th Cir.), cert. denied, 419 U.S. 1050 (1974), on which petitioners rely heavily (Pet. 10-11), did not focus on the distinction between evidence observed during an illegal entry and evidence observed for the first time during the ensuing warrant search. As a result, the *Griffin* case generally was read as standing for the proposition that neither kind of evidence could be admitted, even if it was obtained as a result of a subsequent search pursuant to an untainted warrant. See, *e.g.*, *Segura*, slip op. 5 (erroneous district court decision had relied on *Griffin*); *United States* v. *Allard*, 634 F.2d 1182, 1186-1187 (9th Cir. 1980). Now that *Segura* has established that evidence found in an apartment secured by means of an illegal entry may be admitted if it was obtained during a lawful warrant search and *Nix* has established the validity of the inevitable discovery doctrine, there is no reason to suppose that the Sixth Circuit would reach the same result in *Griffin* today. The Second Circuit's decision in *Segura*, while it does draw a distinction between the two kinds of evidence, did not consider the applicability of the inevitable discovery doctrine to evidence first observed during an initial, unlawful entry. In light of *Nix*, the Second Circuit's *Segura* decision cannot be considered binding authority today that such evidence ought to be suppressed.

Petitioners rely heavily on one case decided after *Segura* and *Nix*, *United States* v. *Satterfield*, 743 F.2d 827, 845-847 (11th Cir. 1984). That case, however, is distinguishable. First, in *Satterfield*, the evidence was *seized* in the course of the illegal entry; thus, the evidence was not actually obtained by the police through lawful means. Moreover, in *Satterfield* the unlawful entry was not made simply for the purpose of conducting a protective sweep to secure the premises while awaiting the issuance of a search warrant; it was made for the purpose of conducting a full-scale warrantless search for evidence.

On those facts, the Eleventh Circuit reasonably concluded that the warrant search was a separate and subsequent investigative measure that did not meet its requirements (derived from established Fifth Circuit precedent, *United States* v. *Brookins*, 614 F.2d 1037 (1980)), for application of the inevitable discovery doctrine. Specifically, the court of appeals held that the inevitable discovery doctrine did not apply because the lawful means of discovering the evidence was not "being actively pursued" prior to the illegal search (743 F.2d at 846).

This case is quite different. It does not involve two separate searches for evidence like *Satterfield*; rather, it involves one continuous series of events directed at lawfully searching the warehouse pursuant to a warrant. In March 1983, the investigating agents learned that petitioners were using a warehouse somewhere in South Boston to store marijuana (Pet. App. A33). On April 5, they followed petitioners and determined that the warehouse in question was the building at 345 D Street (*id.* at A37-A40). After observing that an individual who was guarding the warehouse had disappeared from view, the agents made a brief entry and sweep of the warehouse in the reasonable (though perhaps mistaken) belief that exigent circumstances justified such an entry "to apprehend any participants who might have remained inside and to guard against the destruction of possibly critical evidence" pending the arrival of a search warrant (*id.* at A41). After they established that no one was inside the warehouse, the agents waited until the search warrant was obtained. When the warrant arrived, the agents entered the warehouse and—for the first time—searched it for evidence. In short, the warrantless entry here was simply an early stage of a procedure designed to culminate in a warrant search, rather than a substitute for a warrant search, as in *Satterfield*. In light of this fundamental distinction, there is good reason to believe that the Eleventh Circuit would regard the situation here as one in

which the police were "actively pursu[ing]" the legal means of obtaining the evidence at the time of the illegal entry and therefore would regard the inevitable discovery doctrine as applicable. See, *e.g.*, *Wicker* v. *McCotter*, 783 F.2d 487, 497-498 (5th Cir. 1986). Hence, there is no genuine conflict between the decision below and *Satterfield*.[8]

There is one other court of appeals case that has addressed the question presented here in light of *Segura* and *Nix*; but that case reached the same conclusion as the court below. In *United States* v. *Merriweather*, 777 F.2d 503 (9th Cir. 1985), the court held that evidence observed during an unlawful search of a motel room was admissible because it would inevitably have been discovered during the ensuing warrant search. See also *United States* v. *Andrade*, 784 F.2d 1431 (9th Cir. 1986).

In sum, the decision below raises a question concerning the effect of unlawful initial intrusions that was not resolved by *Segura*. There is no true conflict among the courts of appeals that have addressed the question since *Segura* and *Nix*, and we submit that the courts in this case and in *Merriweather* have resolved it correctly. Therefore, review of this question by this Court may ultimately prove to be unnecessary and would be premature at this time.

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[8] *United States* v. *Dart*, 747 F.2d 263 (4th Cir. 1984) (see Pet. 10-12), while decided after *Nix* and *Segura*, is wholly inapposite. In that case, the court ordered suppressed *all* the evidence found in a warehouse when a warrant was obtained following a full-fledged warrantless search because the warrant was issued on the basis of evidence obtained during the illegal search. Indeed, the court strongly suggested that all of the evidence would have been admissible had the police merely conducted a brief sweep of the warehouse and then secured the premises pending the arrival of a valid warrant—precisely what was done here—rather than conducting a full-scale search. The court had no occasion to consider the issue presented here.

3. All petitioners contend (85-1105 Pet. 7-12; 85-1120 Pet. 18-22) that the court of appeals erred in calculating the amount of time that was excludable under the Speedy Trial Act for the consideration and decision of the pretrial motions.

At the outset, we note that petitioners' assertion that this case should be consolidated with or held for *Henderson* v. *United States*, No. 84-1744 (argued Apr. 1, 1986), is without foundation. That case presents a question on which the courts of appeals are divided: whether the pretrial motion exclusion contained in Section 3161(h)(1)(F) of the Speedy Trial Act[9] is subject to a "reasonable necessity" limitation. Compare *United States* v. *Henderson*, 746 F.2d 619 (9th Cir. 1984), cert. granted, No. 84-1744 (argued Apr. 1, 1986); *United States* v. *Mastrangelo*, 733 F.2d 793, 796 (11th Cir. 1984); *United States* v. *Horton*, 705 F.2d 1414, 1416 (5th Cir.), cert. denied, 464 U.S. 997 (1983); *United States* v. *Stafford*, 697 F.2d 1368 (11th Cir. 1983) (all excluding, without qualification, entire period between filing and disposition of pretrial motions) with *United States* v. *Ray*, 768 F.2d 991, 998 (8th Cir. 1985); *United States* v. *Mitchell*, 723 F.2d 1040, 1047 (1st Cir. 1983); *United States* v. *Janik*, 723 F.2d 537, 544 (7th Cir. 1983); *United States* v. *Novak*,

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[9] 18 U.S.C. 3161 provides in pertinent part:

> (h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:
>
> > (1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—
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> > * * * * *
> >
> > (F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

715 F.2d 810, 820 (3d Cir. 1983), cert. denied, 465 U.S. 1030 (1984); *United States* v. *Cobb*, 697 F.2d 38, 44 (2d Cir. 1982) (all limiting the length of the exclusion to that "reasonably necessary" for disposition of pretrial motions). The First Circuit has already aligned itself with those courts of appeals holding that the period of time excludable under Section 3161(h)(1)(F) is limited to that "reasonably necessary from the time of filing a pretrial motion to the time of concluding a hearing on it or completing submission of the matter to the court for decision" (*United States* v. *Mitchell*, 723 F.2d at 1047). Indeed, the court of appeals specifically adverted to this "reasonableness" requirement in making its determination regarding the correct computation of time excludable under Section 3161(h)(1)(F). See Pet. App. A9, A87. Therefore, even if this Court reverses in *Henderson* and holds that the pretrial motion exclusion of Section 3161(h)(1)(F) is subject to a "reasonable necessity" limitation, the ruling would have no effect on the result in this case.

Assuming, as did the court below, that the pretrial motion exclusion contained in Section 3161(h)(1)(F) is subject to a limitation based upon a determination of reasonable necessity, the question is simply whether the period of time excluded under that section was reasonably necessary for the disposition of the particular pretrial motions filed in this case. That fact-bound question was correctly decided by the court below and plainly does not merit review by this Court.

Petitioners obfuscate the issue here somewhat by repeatedly suggesting that the court of appeals approved an excludable period of 195 days to decide the nonsuppression motions. That is misleading. Petitioners conceded in the court of appeals (see Pet. App. A5) that the bulk of that period, from the filing of the pretrial motions on May 9, 1983, to the suppression hearing on October 17, 1983,

was excludable. And the court of appeals' holding that the 30-day period following the hearing, during which the suppression motions were under advisement, was excludable under Section 3161(h)(1)(J) is plainly correct and is not challenged by petitioners.

Thus, the question here is simply whether at least five additional days are excludable as a period reasonably necessary for the district court to consider the nonsuppression motions, either before they were taken under advisement (18 U.S.C. 3161(h)(1)(F)) or after they were taken under advisement (18 U.S.C. 3161(h)(1)(J); see *United States* v. *Tibboel*, 753 F.2d 608, 611-612 (7th Cir. 1985)). Petitioners do not dispute that at least five days were required to consider these motions; indeed, they suggest that a month would have been a reasonable time (85-1105 Pet. 12). Their assertion is that the district court should have completed its consideration of those motions during the period that the suppression motions were awaiting decision. The district court explained, however, that, because suppression of the evidence would obviate the need to rule on some or all of the nonsuppression motions, it considered it appropriate to postpone consideration of those latter motions until after it had decided the suppression motions. The court of appeals agreed that it was reasonable for the district court to order its consideration of the motions in this manner. Under that analysis, the time attributable to the consideration of the nonsuppression motions did not occur during the period already excluded because of the suppression motions, but rather did not begin until the motions were taken under advisement at a later time. This results in the exclusion of at least five additional days, which satisfies the statutory limitations of the Speedy Trial Act.[10] Therefore, petitioners can prevail

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[10] Under 18 U.S.C. 3161(h)(1)(J), it is clear that 30 days would be excludable for consideration of these motions after they were taken under advisement. The court of appeals did not specify the exact days

on this point only if they demonstrate that the district court acted unreasonably in considering the nonsuppression motions during the period between November 16 and December 21, 1983.

Petitioners make no effort to argue that it was unreasonable for the district court to wait until it had determined to deny the suppression motions before beginning to consider the nonsuppression motions. For the reasons well stated by the courts below (see Pet. App. A8-A9), it clearly was reasonable for the district court to order its docket in this fashion. See also *United States* v. *Anello*, 765 F.2d 253, 256 (1st Cir. 1985), cert. denied, No. 85-679 (Nov. 18, 1985). What petitioners contend is that the district court in fact did not order its docket in this manner because the record shows that the nonsuppression motions were denied on December 21, while the suppression motions were denied on December 23. This hypertechnical objection misses the point because the dates on which the court's orders were entered do not necessarily reflect the periods during which the court was actively considering the various motions.

On December 23, 1983, the district court entered a detailed opinion (Pet. App. A31-A47) addressing the diverse and complex suppression issues raised by petitioners. It is obvious that the preparation of that opinion took more than two days and therefore that the district court had determined prior to December 21 that it would deny the suppression motions. Thus, the docket information relied upon so heavily by petitioners provides no basis

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that were excludable, but it was unnecessary to do so here because the excludable time needed to satisfy the Speedy Trial Act was so short. As long as the nonsuppression motions were not taken under advisement during the first five days after the suppression hearing, which plainly did not occur, the Act was satisfied. Thus, in order to prevail, petitioners must show that the district court did not reasonably postpone taking the nonsuppression motions under advisement until after it had determined to deny the suppression motions.

for doubting the district court's explanation that it did not begin to consider the nonsuppression motions until it had decided the suppression motions. On the contrary, the record is fully consistent with the description of the course of events that formed the basis for the court of appeals' decision: numerous motions were filed by the defendants and held in abeyance until the suppression hearing was held; at that point the court first considered the suppression motions. When the court had determined to deny the suppression motions and while an opinion was being prepared, the court turned to the nonsuppression motions and considered them so that it could enter orders on all the motions at approximately the same time. It was reasonable and consistent with the time limits of the Speedy Trial Act for the district court to proceed in this fashion, and, whether its order denying the nonsuppression motions was entered on December 21 or December 23, there is no basis for disbelieving the district court's assertion that it did so proceed.

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

Michael F. Murray,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Our Petition pointed out that the First Circuit's decision in this case with respect to the warehouse searches was in conflict with decisions of the Second, Fourth, Fifth, Sixth, Eighth and Eleventh Circuits; with the decisions of the highest courts of eight states; and with decisions of the intermediate appellate courts of two other states (Pet., at pp. 10-14). The government does not deny this, but claims that there is not really a "true" conflict because some of the cases were decided before *Nix v. Williams*, 467 U.S. 431 (1984), and those courts of appeals might now reach

a different decision in light *Nix's* recognition of the inevitable discovery rule.

There is nothing to the government's position. *Nix* did not change the law in the federal courts. It merely reaffirmed it. Prior to *Nix*, "[e]very Federal Court of Appeals having jurisdiction over criminal matters . . . endorsed the inevitable discovery doctrine." *Nix v. Williams*, 467 U.S. at 440 n.2. The courts of appeals that have decided cases in conflict with the court below thus did so despite their recognition of an inevitable discovery rule. Moreover, the government says nothing about the state court decisions we have cited. The quotations in our Petition show that these courts specifically considered and rejected application of the inevitable discovery rule to cure an illegal search because to do so would be to destroy the warrant requirement. See Pet., at pp. 12-14, notes 12-18.

Still further, to say that the outcome in those conflicting circuits should be different in light of *Nix* is to beg the question presented by this case.[1] As the Petition discusses, the Eleventh Circuit, in a case decided after *Nix*, specifically refused to adopt the position the government expouses here. *United States v. Satterfield*, 743 F.2d 827 (11th Cir. 1984). The Fifth Circuit has now done the same in *United States v.*

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[1] Our Petition cites the Second Circuit's decision in *United States v. Segura*, 663 F.2d 411 (2d Cir. 1981), to show the conflict between that court of appeals and the decision here. We add the Second Circuit's earlier opinion in *United States v. Alvarez*, 643 F.2d 54, 64 (2d Cir.) ("we will not risk the whittling down of the warrant requirement . . . by justifying the admission of evidence under a broad inevitable-discovery exception"), *cert. denied*, 454 U.S. 839 (1981).

Cherry, 759 F.2d 1196, 1205 (5th Cir. 1985), which relied upon *Satterfield* and the leading case of *United States v. Griffin*, 502 F.2d 959, 961 (6th Cir.), *cert. denied*, 419 U.S. 1050 (1974), to hold that a result such as that reached by the court below "would cause the inevitable discovery exception to swallow the [warrant requirement] by allowing evidence otherwise tainted to be admitted merely because the police could have chosen to act differently and obtain the evidence by legal means."

The Tenth Circuit, in a post-*Nix* decision not cited by the government, also has now joined the six other circuits which are in conflict with the court below.[2] In *United States v. Owens*, 782 F.2d 146, 152-53 (10th Cir. 1986), the Tenth Circuit, like the Eleventh Circuit in *Satterfield*, held that when an illegal search occurs, the process of procuring the evidence legally must already be underway or the inevitable discovery rule will not apply. See also *United States v. Romero*, 692 F.2d 699, 704 (10th Cir. 1982).[3]

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[2] It is true, as the government points out, that the Ninth Circuit has now joined the court below in applying *Nix* in the "search-illegally-first-obtain-the-warrant-later" context. See *United States v. Merriweather*, 777 F.2d 503 (9th Cir. 1985). But as Circuit Judge Reinhardt recently stated, this precedent now requires the Ninth Circuit to reach a result that "will serve only to encourage illegal and unconstitutional searches." *United States v. Andrade*, No. 85-3122, decided March 19, 1986 (9th Cir.) (Reinhardt, J., "specially concurring").

[3] The government asserts that the "warrantless entry here was simply an early stage of a procedure designed to culminate in a warrant search" (Brief in Opp., at p. 16 [typescript]). This is indeed a remarkable assertion. The idea that one may violate the Fourth Amendment in order to comply with it is not now and never will be part of this country's jurisprudence.

The government can take no comfort from *Segura v. United States*, 104 S.Ct. 3380 (1984), which even the First Circuit acknowledged was "arguably" against its decision in this case. *Nix* was decided before *Segura*. Yet if the government were correct that *Nix* applies in the Fourth Amendment context, *Segura* would easily have been decided on inevitable discovery grounds. It was not. Indeed, the Chief Justice in his majority opinion in *Segura* neither discussed nor cited his opinion for the Court in *Nix*. Instead, his *Segura* opinion reaffirmed that the direct products of illegal entries will continue to be suppressed and added, in a statement joined by Justice O'Connor, that "officers who enter illegally will recognize that whatever evidence they discover as a direct result of the entry may be suppressed, as it was by the Court of Appeals in this case." 104 S.Ct. at 3390.

With respect to the Eleventh Circuit's post-*Nix* decision in *Satterfield*, the government seeks to distinguish the case on the basis that the agents there illegally seized the evidence they discovered upon their warrantless entry, whereas here the agents only illegally discovered the evidence. *Nix*, of course, recognizes no such distinction. It has not been adopted by any other appellate court. It ignores that the Fourth Amendment's warrant requirement applies to both searches and seizures. And it leads to the untenable proposition that officers may first search without a warrant and then seek one only if they have illegally found something worth carrying away.

Moreover, not even the First Circuit subscribes to the government's theory. In a recent opinion adhering to its decision in this case, the First Circuit held that

when as here the agents conduct an illegal search, observe evidence, secure the premises, then obtain a warrant and seize what they had already illegally discovered, they in effect have seized the evidence from the moment of its unlawful discovery. *United States v. Silvestri*, No. 85-1534, decided April 1, 1986 (1st Cir.), slip op. at pp. 8-9. While nevertheless following its decision in this case, the First Circuit recognized that it had placed itself in conflict with other courts of appeals. The *Silvestri* court thus specifically discussed at length and rejected not only the Second Circuit's decision in *Segura*, but also the Eleventh Circuit's holding in *Satterfield*, the Fifth Circuit's ruling in *Cherry* and the Tenth Circuit's decision in *Owens*, all of which were decided after *Nix*. *United States v. Silvestri*, *supra*, slip op. at pp. 14-24.

The conflict between the federal courts of appeals (and between the First Circuit and the state courts) on this recurring and important issue cannot be denied. The case thus clearly warrants review by this Court.

CONCLUSION

For the foregoing reasons and the reasons stated in the Petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Respondent.

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I hereby certify that a typescript copy (to be replaced with printed copies) of Petitioner Murray's Reply Brief has been mailed, first-class, postage prepaid to the following on Monday, April 14, 1986:

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